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**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**[FHWA Docket No. FHWA-2011-0125]**

**Section 4(f) Policy Paper**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of availability; response to comments.

**SUMMARY:** This document provides notice of the availability of the final Section 4(f) Policy Paper that will provide guidance on the procedures FHWA will follow when approving the use of land from publicly owned public parks, recreation areas, wildlife and waterfowl refuges, and public or private historic sites for Federal highway projects.

**EFFECTIVE DATE:** July 20, 2012.

**FOR FURTHER INFORMATION CONTACT:** Ms. MaryAnn Naber, FHWA Office of Planning, Environment, and Realty, (202) 366-2060, or via email at [MaryAnn.Naber@dot.gov](mailto:MaryAnn.Naber@dot.gov). For legal questions, please contact Ms. Diane Mobley, Attorney Advisor, FHWA Office of the Chief Counsel, (202) 366-1366, or via email at [Diane.Mobley@dot.gov](mailto:Diane.Mobley@dot.gov). Business hours for FHWA are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

This document may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov> under docket ID FHWA- 2011-0125. Electronic submission and retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 366 days this year. Please follow the instructions. It is also available on

FHWA's Web site at: <http://www.fhwa.dot.gov>. In addition, a hard copy of the final Section 4(f) Policy Paper may be viewed and copied at the U.S. Department of Transportation, Dockets Management Facility, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC, 20590.

## **Background**

Section 4(f) concerns the use of land from publicly owned parks, recreation areas, wildlife and waterfowl refuges, and public or private historic sites for transportation projects funded or approved by agencies of the U.S. Department of Transportation. Although these requirements are now codified at 23 U.S.C. 138 and 49 U.S.C. 303, the subject matter remains commonly referred to as “Section 4(f)” because the requirements originated in Section 4(f) of the Department of Transportation Act of 1966 (Pub. L. 89-670, 80 Stat. 931). The FHWA's Section 4(f) regulations, entitled “Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites,” were promulgated in 2008 and are codified at 23 CFR Part 774. The Section 4(f) Policy Paper provides guidance on the procedures that FHWA will follow when approving the use of land from publicly owned public parks, recreation areas, wildlife and waterfowl refuges, and public or private historic sites for Federal highway projects.

This Section 4(f) Policy Paper replaces the previous Section 4(f) Policy Paper that FHWA issued in 2005. Later in 2005, Congress amended Section 4(f) in Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, Aug. 10, 2005, 119 Stat. 1144). This version of the Section 4(f) Policy Paper incorporates the changes that were made in Section 6009 of SAFETEA-LU and the 2008 regulations. The Section 4(f) Policy Paper consists of two

parts: Part I provides an overview and background information, a chronological description of the analysis process that FHWA follows to comply with Section 4(f) for a typical project, and a discussion of recommended documentation practices in various situations. Part II consists of frequently encountered questions and answers.

### **Comments on the Draft Section 4(f) Policy Paper**

On January 4, 2012, FHWA published a notice in the Federal Register at 77 FR 321 announcing the availability of the draft Section 4(f) Policy Paper with a request for comments. The FHWA carefully considered all comments received. Comments were submitted by 12 State DOTs, 3 Federal agencies, 2 Indian tribes, 1 transit agency, 4 trade associations/interest groups, and 9 individuals. The comments are available for public review in the docket referenced above.

Overall, the commenters indicate that the Section 4(f) Policy Paper will be helpful. The majority of changes made in response to the comments were clarifications to the language in the draft rather than substantive changes to FHWA's 4(f) policies. Several commenters suggested policy changes that would conflict with FHWA's statutory or regulatory obligations; those comments were not adopted. For example, one commenter requested that the final decisionmaking authority be vested in the officials with jurisdiction over Section 4(f) property rather than FHWA. Many commenters offered formatting, grammatical, or editorial suggestions; those types of comments were adopted when deemed appropriate.

One complex topic on which a number of comments were received concerned properties with some characteristics that may be similar to a wildlife and waterfowl refuge, such as a private property with a conservation-type easement, and how FHWA

determines if such properties are considered to be wildlife and waterfowl refuges for purposes of Section 4(f). The FHWA makes these determinations on an individual, property-by-property basis following the guidelines described in Q&As 1A, 1B, 1C, 1D, and 1E. The FHWA clarified those Q&As in the final version but did not adopt commenter recommendations to make categorical decisions, based for example on various Federal grant programs, or to ignore whether a property with a conservation easement is or is not open to the public.

Several commenters questioned whether various aspects of the Policy Paper are in the nature of recommendations or are actual requirements. The final Section 4(f) Policy Paper does not impose requirements beyond what is currently required by statute or regulation and includes references to the statute or regulation providing the basis for all requirements mentioned in the Policy Paper. One commenter asked that a formal dispute resolution process be created and a few other commenters asked for a mandate that various findings and disagreements must be published in an Environmental Impact Statement. Although these suggestions were not adopted, additional detail about recommended practices was added to the discussion in Section 4.0, *Documentation*. There were also requests for various visual aides such as matrices or tables. As a result, an overview flowchart of the Section 4(f) process was created and added as an appendix. Finally, internal U.S. Department of the Interior (DOI) instructions for distribution that had been included as an appendix in the draft Policy Paper were revised by the DOI after publication of the draft Policy Paper. The final Policy Paper includes a link to the relevant area of DOI's Web site in lieu of including the instructions as an appendix.

The main changes from the draft to the final version in *Part I – Section 4(f) Overview* are described in this paragraph. The headings for Section 1.2 were updated and Section 1.2.2, *Role of Officials with Jurisdiction*, now notes that concurrences should be in writing, and that the regulations require only a “lack of objection” rather than “concurrence” prior to applying the exception for archeological sites of minimal value for preservation in place. Section 1.3, *When does Section 4(f) apply?*, now notes that an obligation of construction funds is an “approval” for purposes of Section 4(f), as well as noting that there are regulatory applicability rules and exceptions. In Section 3.2, *Assessing use of Section 4(f) Properties*, guidance was added about the meaning of “substantially impaired” (also in Q&A 7A), as well as guidance on determining the boundaries of a protected property. Section 3.3.2, *Programmatic Section 4(f) Evaluations*, now notes that programmatic evaluations can be national, regional, or local. Within Section 3.3.3.1, *Feasible and Prudent Avoidance Alternatives*, language was added emphasizing the need to try and avoid using Section 4(f) property when it is feasible and prudent to do so. Section 3.3.3.2., *Least Overall Harm*, now notes, consistent with the preamble to the Section 4(f) regulations, that when two or more alternatives are substantially equal, FHWA can approve any of those alternatives. The subject of documentation was moved to its own Section, 4.0, and additional guidance was added.

The main changes from the draft to the final version in *Part II - Questions and Answers Regarding Section 4(F) Applicability and Compliance* are described in this paragraph. Q&A 1E now includes, consistent with Q&A 17C, the possibility that a site purchased as mitigation for a transportation project could be considered a refuge for

purposes of Section 4(f) if the mitigation site meets all of the applicable criteria for Section 4(f) status as a refuge. The Q&A 2A now explains, consistent with prior FHWA Section 4(f) Policy Papers, the circumstances where FHWA may apply Section 4(f) to a historic site that is not on or eligible for the National Register of Historic Places (NR). The Q&A 2B, concerning phased Section 106 consultation processes, was moved from its former location at Q&A 10B, and explanation added about the level of effort that should be undertaken to identify Section 4(f) properties. The Q&A 6 now notes that Traditional Cultural Properties may be eligible for the NR under other criteria besides just archeology. It was determined that former Q&A 13D concerning the phasing-in of the *de minimis* impact legislation was no longer necessary due to the passage of time and it was removed as a result. In Q&A 24 examples were added of the types of government action that could indicate the reservation of a transportation corridor within a new park, recreation area or refuge. Finally, a new Q&A 30 was added to explain how FHWA complies with Section 4(f) in emergencies.

(Authority: 23 U.S.C. 101, 109, 138 and 139; 23 CFR 1.32 and 774; 49 U.S.C. 303; and, 49 CFR 1.48(b)).

Issued on: July 11, 2012

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Victor M. Mendez  
Administrator

**FINAL SECTION 4(f) POLICY PAPER:** The text of the final Section 4(f) Policy Paper is as follows:

## **FHWA SECTION 4(f) POLICY PAPER**

### **PART I – SECTION 4(f) OVERVIEW**

#### **1.0 Introduction**

This *Section 4(f) Policy Paper* supplements the Federal Highway Administration's (FHWA) regulations governing the use of land from publicly owned parks, recreation areas, wildlife and waterfowl refuges, and public or private historic sites for Federal highway projects. Although these requirements are now codified at 23 U.S.C. § 138 and 49 U.S.C. § 303, this subject matter remains commonly referred to as Section 4(f) because the requirements originated in Section 4(f) of the *Department of Transportation Act of 1966* (Pub. L. 89-670, 80 Stat. 931). The *Section 4(f) Policy Paper* replaces the FHWA's 2005 edition of the document. The FHWA's Section 4(f) regulations, entitled *Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites*, are codified at 23 CFR Part 774. Many of the terms used in this *Section 4(f) Policy Paper* are defined in the regulation at 23 CFR 774.17.

#### **1.1 Purpose**

This *Section 4(f) Policy Paper* was written primarily to aid FHWA personnel with administering Section 4(f) in a consistent manner. In situations where a State has assumed the FHWA responsibility for Section 4(f) compliance, this guidance is intended to help the State fulfill its responsibilities. Such situations may arise when Section 4(f) responsibilities are assigned to the State in accordance with 23 U.S.C. §§ 325, 326, 327, or a similar applicable law. Unless otherwise noted, references to "FHWA" in this document include a State department of transportation (State DOT) acting in FHWA's capacity pursuant to an assumption of FHWA's responsibilities under such laws.

This guidance is also intended to help State DOTs and other applicants for grants-in-aid for highway projects to plan projects that minimize harm to Section 4(f) properties. Experience demonstrates that when Section 4(f) is given consideration early in project planning, the risk of a project becoming unnecessarily delayed due to Section 4(f) processing is minimized. Ideally, applicants should strive to make the preservation of Section 4(f) properties, along with other environmental concerns, part of their long and short range transportation planning processes. Information and tools to help State DOTs, metropolitan planning organizations and other applicants accomplish this goal are available on FHWA's Planning and Environmental Linkages website located at: <http://environment.fhwa.dot.gov/integ/index.asp>.

This *Section 4(f) Policy Paper* is based on and is intended to reflect: the statute itself, the legislative history of the statute; the requirements of the Section 4(f) regulations; relevant court decisions; and FHWA's experience with implementing the statute over four decades, including interactions with the public and with agencies having jurisdiction over Section 4(f) properties. The information presented is not regulatory and does not create any right of action that may be enforced by a private citizen in a court of law. This *Section 4(f) Policy Paper* sets forth the official policy of FHWA on the applicability of Section 4(f) to various types of land and resources, and other Section 4(f) related issues. While the other United States Department of Transportation (U.S. DOT) agencies may choose to rely upon some or all of this *Section 4(f) Policy Paper* as a reference, it was not written as guidance for any U.S. DOT agency other than FHWA.

This guidance addresses the majority of situations related to Section 4(f) that may be encountered in the development of a transportation project. If a novel situation or project arises which does not completely fit the situations or parameters described in this *Section 4(f) Policy Paper*, the relevant FHWA Division Office,<sup>1</sup> the FHWA Headquarters Office of Project Development and Environmental Review, the Resource Center Environment Technical Service Team, and/or the Office of Chief Counsel should be consulted as appropriate for assistance. For additional information on Section 4(f) beyond that which is contained in this *Section 4(f) Policy Paper*, readers should refer to the FHWA Environmental Review Toolkit.<sup>2</sup>

## **1.2 Agency Authority and Responsibilities**

### **1.2.1 Role of U.S. DOT**

The authority to administer Section 4(f) and make Section 4(f) approvals resides with the Secretary of the U.S. DOT. The statute designates the Secretaries of the Interior, Housing and Urban Development, and Agriculture, as well as the States, for consultation roles as appropriate. This means that the Secretary of Transportation is responsible for soliciting and considering the comments of these other entities, as well as the appropriate official(s) with jurisdiction over the Section 4(f) property, as part of the administration of Section 4(f). However, the ultimate decision maker is the Secretary of Transportation. In a number of instances, the Section 4(f) regulations require the concurrence of various officials in limited circumstances as discussed below.

The Secretary of Transportation has delegated the authority for administering Section 4(f) to the FHWA Administrator in 49 CFR 1.48. The authority has been re-delegated to the FHWA Division Administrators, the Associate Administrator for Planning, Environment, and Realty, and the Federal Lands Highway Associate Administrator by *FHWA Order M1100.1A*, Chapter 5, Section 17e and Chapter 6, Section 7d. Any approval of the use of Section 4(f) property, other than a use with a *de minimis* impact or a use processed with an existing programmatic Section 4(f) evaluation is subject to

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<sup>1</sup> This may be a Federal Lands Highway Division Office if the project is located on Federal lands.

<sup>2</sup> <http://www.environment.fhwa.dot.gov/index.asp>



legal sufficiency review by the Office of Chief Counsel.

## **1.2.2 Role of Officials with Jurisdiction**

### **Consultation**

The regulations define the entities and individuals who are considered the officials with jurisdiction for various types of property in 23 CFR 774.17. In the case of historic sites, the officials with jurisdiction are the State Historic Preservation Officer (SHPO), or, if the property is located on tribal land, the Tribal Historic Preservation Officer (THPO).<sup>3</sup> If the property is located on tribal land but the relevant Indian tribe has not assumed the responsibilities of the SHPO, then a representative designated by the tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the Advisory Council on Historic Preservation (ACHP) is involved in consultation concerning a property under Section 106 of the *National Historic Preservation Act* (NHPA) (16 U.S.C. § 470), the ACHP is also an official with jurisdiction over that resource for the purposes of Section 4(f). When the Section 4(f) property is a National Historic Landmark (NHL), the designated official of the National Park Service is also an official with jurisdiction over that resource for the purposes of Section 4(f). In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the officials with jurisdiction are the officials of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property.

### **Coordination**

The regulations require coordination with the official(s) with jurisdiction for the following situations prior to Section 4(f) approval (recognizing that additional coordination may be required under other statutes or regulations):

- Prior to making approvals, (23 CFR 774.3(a));
- Determining least overall harm, (23 CFR 774.3(c));
- Applying certain programmatic Section 4(f) evaluations, (23 CFR 774.5(c));
- Applying Section 4(f) to properties that are subject to Federal encumbrances, (23 CFR 774.5(d));
- Applying Section 4(f) to archeological sites discovered during construction, (23 CFR 774.9(e));
- Determining if a property is significant, (23 CFR 774.11(c));
- Determining application to multiple-use properties, (23 CFR 774.11(d));
- Determining applicability of Section 4(f) to historic sites, (23 CFR 774.11(e));
- Determining constructive use, (23 CFR 774.15(d));
- Determining if proximity impacts will be mitigated to equivalent or better condition, (23 CFR 774.15(f)(6)); and
- Evaluating the reasonableness of measures to minimize harm, (23 CFR 774.3(a)(2) and 774.17).

### **Lack of Objection**

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<sup>3</sup> *Tribal lands* means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities (16 U.S.C. § 470w).

The regulations require a finding that the official(s) with jurisdiction have been consulted and “have not objected” in the following situations:

- When applying the exception for restoration, rehabilitation, or maintenance of historic transportation facilities, (23 CFR 774.13(a)); and
- When applying the exception for archeological sites of minimal value for preservation in place. (23 CFR 774.13(b)(2)).

### **Concurrence**

The regulations require written concurrence of the official(s) with jurisdiction in the following situations:

- Finding there are no adverse effects prior to making *de minimis* impact findings, (23 CFR 774.5(b));
- Applying the exception for temporary occupancies, (23 CFR 774.13(d)); and
- Applying the exception for transportation enhancement activities and mitigation activities, (23 CFR 774.13(g)).

### **1.3 When Does Section 4(f) Apply?**

The statute itself specifies that Section 4(f) applies when a U.S. DOT agency approves a transportation program or project that uses Section 4(f) property. The FHWA does not currently approve any transportation programs; thus, Section 4(f) is limited to project approvals. In addition, for the statute to apply to a proposed project there are four conditions that must all be true:

- 1) The project must require an approval<sup>4</sup> from FHWA in order to proceed;
- 2) The project must be a transportation project;<sup>5</sup>
- 3) The project must require the use of land from a property protected by Section 4(f) (*See* 23 U.S.C. § 138(a) and 49 U.S.C. § 303(a)); and
- 4) None of the regulatory applicability rules or exceptions applies (*See* 23 CFR 774.11 and 13).

Examples of the types of proposed situations where Section 4(f) would not apply include, but are not limited to:

- 1) A transportation project being constructed solely using State or local funds and not requiring FHWA approval.
- 2) A project intended to address a purpose that is unrelated to the movement of people, goods, and services from one place to another (i.e., a purpose that is not a transportation purpose).
- 3) A project to be located adjacent to a Section 4(f) property, causing only minor proximity impacts to the Section 4(f) property (i.e., no constructive use).
- 4) A project that will use land from a privately owned park, recreation area, or refuge.

Additional information about these examples and many other examples of situations where

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<sup>4</sup> Examples include the obligation of construction funds and the approval of access modifications on the Interstate System.

<sup>5</sup> Most projects funded by FHWA are transportation projects; however, in a few instances certain projects eligible for funding, such as the installation of safety enhancement barriers on a bridge, have been determined not to have a transportation purpose and therefore do not require a Section 4(f) approval.

Section 4(f) approval is or is not required is located in the questions and answers provided in Part II of this *Section 4(f) Policy Paper*. In situations where FHWA has determined that Section 4(f) does not apply, the project file should contain sufficient information to demonstrate the basis for that determination (*See* Section 4.0, *Documentation*).

## **2.0 Background**

The FHWA originally issued the *Section 4(f) Policy Paper* in 1985, with minor amendments in 1989. A 2005 edition provided comprehensive new guidance on when and how to apply the provisions of Section 4(f), including how to choose among alternatives that all would use Section 4(f) property. Later in 2005, Congress substantially amended Section 4(f) in the *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users* (SAFETEA-LU), (Pub. L. 109-59 (Aug. 10, 2005), 119 Stat. 1144). SAFETEA-LU directed the U.S. DOT to revise its Section 4(f) regulations. In response, FHWA and the Federal Transit Administration consulted with interested agencies and environmental organizations before drafting a notice of proposed rulemaking. The notice of proposed rulemaking was published for comment in the Federal Register (71 *Fed. Reg.* 42611, July 27, 2006).

Following careful consideration of the comments submitted, the new Section 4(f) regulations were issued in March 2008 (73 *Fed. Reg.* 13368, March 12, 2008). A minor technical correction followed shortly thereafter (73 *Fed. Reg.* 31609, June 3, 2008). The new Section 4(f) regulations clarified the feasible and prudent standard, implemented a new method of compliance for *de minimis* impact situations, and updated many other aspects of the regulations, including the adoption of regulatory standards based upon the 2005 edition of the *Section 4(f) Policy Paper* for choosing among alternatives that all use Section 4(f) property. This 2012 edition of the *Section 4(f) Policy Paper* includes guidance for all of the changes promulgated in the Section 4(f) regulations in 2008.

If any apparent discrepancy between this *Section 4(f) Policy Paper* and the Section 4(f) regulation should arise, the regulation takes precedence. The previous editions of this *Section 4(f) Policy Paper* are no longer in effect.

## **3.0 Analysis Process**

### **3.1 Identification of Section 4(f) Properties**

Section 4(f) requires consideration of:

- Parks and recreational areas of national, state, or local significance that are both publicly owned and open to the public
- Publicly owned wildlife and waterfowl refuges of national, state, or local significance that are open to the public to the extent that public access does not interfere with the primary purpose of the refuge<sup>6</sup>

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<sup>6</sup> Since the primary purpose of a refuge may make it necessary for the resource manager to limit public access for the protection of wildlife or waterfowl, FHWA's policy is that these facilities are not required to

- Historic sites of national, state, or local significance in public or private ownership regardless of whether they are open to the public (*See* 23 U.S.C. § 138(a) and 49 U.S.C. § 303(a))

When private institutions, organizations, or individuals own parks, recreational areas or wildlife and waterfowl refuges, Section 4(f) does not apply, even if such areas are open to the public. However, if a governmental body has a permanent proprietary interest in the land (such as a permanent easement, or in some circumstances, a long-term lease), FHWA will determine on a case-by-case basis whether the particular property should be considered publicly owned and, thus, if Section 4(f) applies (*See* Questions 1B and 1C). Section 4(f) also applies to all historic sites that are listed, or eligible for inclusion, in the National Register of Historic Places (NR) at the local, state, or national level of significance regardless of whether or not the historic site is publicly owned or open to the public.

A publicly owned park, recreational area or wildlife or waterfowl refuge must be a significant resource for Section 4(f) to apply (*See* 23 CFR 774.11(c) and Question 1A). Resources which meet the definitions above are presumed to be significant unless the official with jurisdiction over the site concludes that the entire site is not significant. The FHWA will make an independent evaluation to assure that the official's finding of significance or non-significance is reasonable. In situations where FHWA's determination contradicts and overrides that of the official with jurisdiction, the reason for FHWA's determination should be documented in the project file and discussed in the environmental documentation for the proposed action.

Section 4(f) properties should be identified as early as practicable in the planning and project development process in order that complete avoidance of the protected resources can be given full and fair consideration (*See* 23 CFR 774.9(a)). Historic sites are normally identified during the process required under Section 106 of the NHPA and its implementing regulations (*See* 36 CFR Part 800). Accordingly, the Section 106 process should be initiated and resources listed or eligible for listing in the NR identified early enough in project planning or development to determine whether Section 4(f) applies and for avoidance alternatives to be developed and assessed (*See* 23 CFR 774.11(e)).

### **3.2 Assessing *Use* of Section 4(f) Properties**

Once Section 4(f) properties have been identified in the study area, it is necessary to determine if any of them would be used by an alternative or alternatives being carried forward for detailed study. *Use* in the Section 4(f) context is defined in 23 CFR 774.17 (*Definitions*) and the term has very specific meaning (*see* also Question 7 in this *Section 4(f) Policy Paper*). Any potential use of Section 4(f) property should always be described in related documentation consistent with this definition, as well as with the language from 23 CFR 774.13(d) (*Exceptions- temporary occupancy*) and 23 CFR 774. 15 (*Constructive Use Determinations*), as applicable. It is not recommended to substitute similar

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always be open to the public. Some areas of a refuge may be closed to public access at all times or during parts of the year to accommodate preservation objectives.

terminology such as affected, impacted, or encroached upon in describing when a use occurs, as this may cause confusion or misunderstanding by the reader.

The most common form of use is when land is permanently incorporated into a transportation facility. This occurs when land from a Section 4(f) property is either purchased outright as transportation right-of-way or when the applicant for Federal-aid funds has acquired a property interest that allows permanent access onto the property such as a permanent easement for maintenance or other transportation-related purpose.

The second form of use is commonly referred to as temporary occupancy and results when Section 4(f) property, in whole or in part, is required for project construction-related activities. The property is not permanently incorporated into a transportation facility but the activity is considered to be adverse in terms of the preservation purpose of Section 4(f). Section 23 CFR 774.13(d) provides the conditions under which “temporary occupancies of land...are so minimal as to not constitute a use within the meaning of Section 4(f).” If all of the conditions in Section 774.13(d) are met, the temporary occupancy does not constitute a use. If one or more of the conditions for the exception cannot be met, then the Section 4(f) property is considered used by the project even though the duration of onsite activities is temporary. Written agreement by the official(s) with jurisdiction over the property with respect to all the conditions is necessary and should be retained in the project file. Assurances that documentation will eventually be obtained via subsequent negotiations are not acceptable. Also, it is typical that the activity in question will be detailed in project plans as an integral and necessary feature of the project.

The third and final type of use is called constructive use. A constructive use involves no actual physical use of the Section 4(f) property via permanent incorporation of land or a temporary occupancy of land into a transportation facility. A constructive use occurs when the proximity impacts of a proposed project adjacent to, or nearby, a Section 4(f) property result in substantial impairment to the property’s activities, features, or attributes that qualify the property for protection under Section 4(f). As a general matter this means that the value of the resource, in terms of its Section 4(f) purpose and significance, will be meaningfully reduced or lost. The types of impacts that may qualify as constructive use, such as increased noise levels that would substantially interfere with the use of a noise sensitive feature such as a campground or outdoor amphitheater, are addressed in 23 CFR 774.15. A project’s proximity to a Section 4(f) property is not in itself an impact that results in constructive use. Also, the assessment for constructive use should be based upon the impact that is directly attributable to the project under review, not the overall combined impacts to a Section 4(f) property from multiple sources over time. Since constructive use is subjective, FHWA’s delegation of Section 4(f) authority to the FHWA Division Offices requires consultation with the Headquarters Office of Project Development and Environmental Review prior to finalizing any finding of constructive use.

In making any finding of use involving Section 4(f) properties, it is necessary to have up to date right-of-way information and clearly defined property boundaries for the Section

4(f) properties. For publicly owned parks, recreation areas, and refuges, the boundary of the Section 4(f) resource is generally determined by the property ownership boundary. Up-to-date right-of-way records are needed to ensure that ownership boundaries are accurately documented. For historic properties, the boundary of the Section 4(f) resource is generally the NR boundary. If the historic property boundary of an eligible or listed site has not been previously established via Section 106 consultation, care should be taken in evaluating the site with respect to eligibility criteria. Depending upon its contributing characteristics, the actual legal boundary of the property may not ultimately coincide with the NR boundary. Since preliminary engineering level of detail (not final design) is customary during environmental analyses, it may be necessary to conduct more detailed preliminary design in some portions of the study area to finalize determinations of use.

Late discovery and/or late designations of Section 4(f) properties subsequent to completion of environmental studies may also occur. Each situation must be assessed to determine if the change in Section 4(f) status results in a previously unidentified need for a Section 4(f) approval pursuant to 23 CFR 774.13(c) (*See* Question 26). The determination should be considered and documented, as appropriate, in any re-evaluation of the project.

### **3.3 Approval Options**

When FHWA determines that a project as proposed may use Section 4(f) property, there are three methods available for FHWA to approve the use:

- 1) Preparing a *de minimis* impact determination;
- 2) Applying a programmatic Section 4(f) evaluation; or
- 3) Preparing an individual Section 4(f) evaluation.

While the applicant will participate in gathering and presenting the documentation necessary for FHWA to make a Section 4(f) approval, the actual approval action is the FHWA's responsibility. The three approval options are set out in 23 CFR 774.3 and are discussed below.

#### **3.3.1 Determination of a *De Minimis* Impact to Section 4(f) Property**

A *de minimis* impact is one that, after taking into account any measures to minimize harm (such as avoidance, minimization, mitigation or enhancement measures), results in either:

- 1) A Section 106 finding of no adverse effect or no historic properties affected on a historic property; or
- 2) A determination that the project would not adversely affect the activities, features, or attributes qualifying a park, recreation area, or refuge for protection under Section 4(f).

In other words, a *de minimis* impact determination is made for the net impact on the Section 4(f) property. The final project NEPA decision document must include sufficient supporting documentation for any measures to minimize harm that were applied to the project by FHWA in order to make the *de minimis* impact determination (*See* 23 CFR

774.7(b)). A use of Section 4(f) property having a *de minimis* impact can be approved by FHWA without the need to develop and evaluate alternatives that would avoid using the Section 4(f) property. A *de minimis* impact determination may be made for a permanent incorporation or temporary occupancy of Section 4(f) property.

A *de minimis* impact determination requires agency coordination and public involvement as specified in 23 CFR 774.5(b). The regulation has different requirements depending upon the type of Section 4(f) property that would be used. For historic sites, the consulting parties identified in accordance with 36 CFR Part 800<sup>7</sup> must be consulted. The official(s) with jurisdiction must be informed of the intent to make a *de minimis* impact determination and must concur in a finding of no adverse effect or no historic properties affected in accordance with 36 CFR Part 800. Compliance with 36 CFR Part 800 satisfies the public involvement and agency coordination requirement for *de minimis* impact findings for historic sites.

For parks, recreation areas, or wildlife and waterfowl refuges, the official(s) with jurisdiction over the property must be informed of the intent to make a *de minimis* impact determination, after which an opportunity for public review and comment must be provided. After considering any comments received from the public, if the official(s) with jurisdiction concurs in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection, then FHWA may finalize the *de minimis* impact determination. The public notice and opportunity for comment as well as the concurrence for a *de minimis* impact determination may be combined with similar actions undertaken as part of the NEPA process. If a proposed action does not normally require public involvement, such as for certain minor projects covered by a categorical exclusion, an opportunity for the public to review and comment on the proposed *de minimis* impact determination must be provided. The opportunity for public input may be part of a public meeting or another form of public involvement. The final determination should be made by the FHWA Division Administrator (or in the case of Federal Lands, the Division Engineer) and all supportive documentation retained as part of the project file (*See* Section 4.0, *Documentation*).

A *de minimis* impact determination (*see* Part II, Questions 11-12) is a finding. It is not an evaluation of alternatives and no avoidance or feasible and prudent avoidance alternative analysis is required. The definition of all possible planning in 23 CFR 774.17 explains that a *de minimis* impact determination does not require the traditional second step of including all possible planning to minimize harm because avoidance, minimization, mitigation, or enhancement measures are included as part of the determination.

A *de minimis* impact determination must be supported with sufficient information included in the project file to demonstrate that the *de minimis* impact and coordination criteria are satisfied (23 CFR 774.7(b)). The approval of a *de minimis* impact should be documented in accordance with the documentation requirements in 23 CFR 774.7(f). These requirements may be satisfied by including the approval in the NEPA documentation – i.e., an Environmental Assessment (EA), Environmental Impact Statement (EIS), or Categorical

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<sup>7</sup> Regulations implementing Section 106 of the NHPA.

Exclusion (CE) determination, Record of Decision (ROD), or Finding of No Significant Impact (FONSI), -- or in an individual Section 4(f) evaluation when one is prepared for a project. When an individual Section 4(f) evaluation is required for a project in which one or more *de minimis* impact determinations will also be made, it is recommended that the individual Section 4(f) evaluation include the relevant documentation to support the proposed *de minimis* impact determination(s).

In situations where FHWA concludes in the individual Section 4(f) evaluation that there is no feasible and prudent avoidance alternative and there are two or more alternatives that use Section 4(f) property, a least overall harm analysis will be necessary pursuant to 23 CFR 774.3(c) (See Section 3.3.3.2, *Alternative with Least Overall Harm*). In such instances, while the *de minimis* impact will be considered in that analysis, the *de minimis* impact is unlikely to be a significant differentiating factor between alternatives because the net harm resulting from the *de minimis* impact is negligible. The determination of least overall harm will depend upon a comparison of the factors listed in the regulation, 23 CFR 774.3(c)(1).

### **3.3.2 Programmatic Section 4(f) Evaluations**

Programmatic Section 4(f) evaluations are a time-saving procedural option for preparing individual Section 4(f) evaluations (discussed in Section 3.3.3) for certain minor uses of Section 4(f) property. Programmatic Section 4(f) evaluations are developed by the FHWA based on experience with many projects that have a common fact pattern from a Section 4(f) perspective. Through applying a specific set of criteria, based upon common experience that includes project type, degree of use and impact, the evaluation of avoidance alternatives is standardized and simplified. An approved programmatic Section 4(f) evaluation may be relied upon to cover a particular project only if the specific conditions in that programmatic evaluation are met. Programmatic evaluations can be nationwide, region-wide, or statewide. The development of any programmatic evaluation, including region-wide and statewide, must be coordinated with the FHWA Office of Project Development and Environmental Review and the FHWA Office of Chief Counsel.

As of the date of publication of this *Section 4(f) Policy Paper*, the FHWA has issued five nationwide programmatic Section 4(f) evaluations:<sup>8</sup>

- 1) Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects
- 2) Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges
- 3) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites
- 4) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges
- 5) Nationwide Programmatic Section 4(f) Evaluation and Approval for

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<sup>8</sup> <http://www.environment.fhwa.dot.gov/4f/4fnationwideevals.asp>



## Transportation Projects That Have a Net Benefit to a Section 4(f) Property

Before being adopted, all of the nationwide programmatic Section 4(f) evaluations were published in draft form in the *Federal Register* for public review and comment. They were also provided to appropriate Federal agencies, including the Department of the Interior (U.S. DOI), for review. Each programmatic Section 4(f) evaluation was reviewed by FHWA's Office of Chief Counsel for legal sufficiency.

It is not necessary to coordinate project-specific applications of approved programmatic Section 4(f) evaluations with the U.S. DOI unless the U.S. DOI owns or has administrative oversight over the Section 4(f) property involved (is an official with jurisdiction or has an oversight role as described Questions 9D and 31). As specified in the applicable programmatic Section 4(f) evaluation, it is still necessary to coordinate with the official(s) with jurisdiction over such properties. A legal sufficiency review of a project-specific application of an approved programmatic Section 4(f) evaluation is not necessary. As such, a primary benefit to using the prescribed step-by-step approach contained in a programmatic evaluation is the reduction of time to process a Section 4(f) approval.

Documentation required to apply a programmatic Section 4(f) evaluation must support that the specific programmatic criteria have been met (*See* 23 CFR 774.3(d)(1)). A separate Section 4(f) document is not required but an indication in the NEPA documentation that Section 4(f) compliance was satisfied by the applicable programmatic evaluation is required (*See* 23 CFR 774.7(f)). As specified in the programmatic evaluations, the requirement to assess whether there is a feasible and prudent avoidance alternative and all possible planning applies. The necessary information supporting the applicability of the programmatic evaluation will be retained in the project file (*See* Section 4.0, *Documentation*).

### 3.3.3 Individual Project Section 4(f) Evaluations

An individual Section 4(f) evaluation must be completed when approving a project that requires the use of Section 4(f) property if the use, as described in Sections 3.1 and 3.2 above, results in a greater than *de minimis* impact and a programmatic Section 4(f) evaluation cannot be applied to the situation (23 CFR 774.3). The individual Section 4(f) evaluation documents the evaluation of the proposed use of Section 4(f) properties in the project area of all alternatives. The individual Section 4(f) evaluation requires two findings, which will be discussed in turn:

- 1) That there is no feasible and prudent alternative that completely avoids the use of Section 4(f) property; and
- 2) That the project includes all possible planning to minimize harm to the Section 4(f) property resulting from the transportation use (*See* 23 CFR 774.3(a)(1) and (2)).

#### 3.3.3.1 Feasible and Prudent Avoidance Alternatives

The intent of the statute, and the policy of FHWA, is to avoid and, where avoidance is not feasible and prudent, minimize the use of significant public parks, recreation areas, wildlife and waterfowl refuges and historic sites by our projects. Unless the use of a Section 4(f) property is determined to have a *de minimis* impact, FHWA must determine that no feasible and prudent avoidance alternative exists before approving the use of such land (*See* 23 CFR 774.3). The Section 4(f) regulations refer to an alternative that would not require the use of any Section 4(f) property as an avoidance alternative. Feasible and prudent avoidance alternatives are those that avoid using any Section 4(f) property and do not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the Section 4(f) property (23 CFR 774.17). This section of the *Section 4(f) Policy Paper* focuses on the identification, development, evaluation, elimination and documentation of potential feasible and prudent avoidance alternatives in a Section 4(f) evaluation document.

The first step in determining whether a feasible and prudent avoidance alternative exists is to identify a reasonable range of project alternatives including those that avoid using Section 4(f) property. The avoidance alternatives will include the no-build. The alternatives screening process performed during the scoping phase of NEPA is a good starting point for developing potential section 4(f) avoidance alternatives and/or design options.<sup>9</sup> Any screening of alternatives that may have occurred during the transportation planning phase may be considered as well. It may be necessary, however, to look for additional alternatives if the planning studies and the NEPA process did not identify Section 4(f) properties and take Section 4(f) requirements into account. If Section 4(f) avoidance alternatives were eliminated during the earlier phases of project development for reasons unrelated to Section 4(f) impacts or a failure to meet the project purpose and need, they may need to be reconsidered in the Section 4(f) process. In addition, it is often necessary to develop and analyze new alternatives, or new variations of alternatives rejected for non-Section 4(f) reasons during the earlier phases.

The no-action or no-build alternative is an avoidance alternative and should be included in the analysis as such. In identifying other avoidance alternatives, FHWA should consider the reasonable alternatives that meet the purpose and need of the project. Potential alternatives to avoid the use of Section 4(f) property may include one or more of the following, depending on project context:

- **Location Alternatives** - A location alternative refers to the re-routing of the entire project along a different alignment.
- **Alternative Actions** - An alternative action could be a different mode of transportation, such as rail transit or bus service, or some other action that does not involve construction such as the implementation of transportation management

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<sup>9</sup> In the Section 4(f) statute, the term *alternative* is used in the context of an option which avoids using land from a Section 4(f) property and is not limited to the context of the end-to-end alternative as defined by the project applicant. This section of the *Section 4(f) Policy Paper* uses the phrase “avoidance alternatives and/or design options” in order to clarify that, depending upon the project context, the potential alternatives that should be evaluated to avoid Section 4(f) property may be end-to-end alternatives *or* may be a change to only a portion of the end-to-end project.

systems or similar measures.

- **Alignment Shifts** - An alignment shift is the re-routing of a portion of the project to a different alignment to avoid a specific resource.
- **Design Changes** - A design change is a modification of the proposed design in a manner that would avoid impacts, such as reducing the planned median width, building a retaining wall, or incorporating design exceptions.

When considering alignment shifts and design changes, it is important to keep in mind the range of allowable configurations and design values for roadway elements and different types of roads. These guidelines are contained within the official state standards and/or the “Green Book,” properly titled *A Policy on the Geometric Design of Highways and Streets* and published by the American Association of State Highway and Transportation Officials. The guidelines set out the generally acceptable ranges of dimensions for roadway elements and typical applications on different types of roadway facilities. These ranges of values provide planners and designers the ability to develop projects at an acceptable cost and level of performance (e.g. safety, traffic flow, sustainability), while balancing the site-specific conditions, constraints, and implications of design decisions. Where it may be appropriate to select a value or dimension outside of the ranges that are established in State and national guidelines, design exceptions are encouraged and permitted. However, the consideration and selection of a value outside of the established ranges should be based on the context of the facility and an analysis of how the design may affect the safety, flow of traffic, constructability, maintainability, environment, cost, and other related issues.

An important consideration in identifying potential avoidance alternatives is that they should have a reasonable expectation of serving traffic needs that have been identified in the project purpose and need. A final limitation in identifying potential avoidance alternatives is that a project alternative that avoids one Section 4(f) property by using another Section 4(f) property is not an avoidance alternative. The goal is to identify alternatives that would not use any Section 4(f) property. (Note: A determination of a *de minimis* impact for a specific Section 4(f) property may be made without considering avoidance alternatives for that property, even if that use occurs as part of an alternative that also includes other uses that are greater than *de minimis*.) Consequently, at this step of analysis the degree of impact to Section 4(f) property is not relevant – the only question is whether the alternative would require any use of Section 4(f) property because an alternative using any amount of Section 4(f) property is not an avoidance alternative. Subsequent steps in the analysis will consider the degree of impact as well as the availability of measures to minimize impacts.

Once the potential avoidance alternative(s) have been identified, the next task is to determine, for each potential avoidance option, whether avoiding the Section 4(f) property is feasible and prudent. The Section 4(f) regulations specify how FHWA is to determine whether a potential avoidance alternative is feasible and prudent in 23 CFR 774.17. The definition explains that a “feasible and prudent avoidance alternative” is one that avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the Section 4(f)

property. In order to determine whether there are other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property, both the feasibility and the prudence of each potential avoidance alternative must be considered.

Care must be taken when making determinations of feasibility and prudence not to forget or de-emphasize the importance of protecting the Section 4(f) property. This stems from the statute itself, which requires that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The regulation incorporates this aspect of the statute in the definition of feasible and prudent avoidance alternative which states that “it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.” In effect, the first part of the definition recognizes the value of the individual Section 4(f) property in question, relative to other Section 4(f) properties of the same type. This results in a sliding scale approach that maximizes the protection of Section 4(f) properties that are unique or otherwise of special significance by recognizing that while all Section 4(f) properties are important, some Section 4(f) properties are worthy of a greater degree of protection than others.

The regulations state that a potential avoidance alternative is not feasible if it cannot be built as a matter of sound engineering judgment (23 CFR 774.17). If a potential avoidance alternative cannot be built as a matter of sound engineering judgment it is not feasible and the particular engineering problem with the alternative should be documented in the project files with a reasonable degree of explanation. In difficult situations, the FHWA Division may obtain assistance from FHWA subject matter experts located in FHWA Headquarters or the FHWA Resource Center.

The third and final part of the *feasible and prudent avoidance alternative* definition sets out standards for determining if a potential avoidance alternative is prudent. An alternative is not prudent if:

- 1) It compromises the project to a degree that it is unreasonable to proceed in light of the project’s stated purpose and need (i.e., the alternative doesn’t address the purpose and need of the project);
- 2) It results in unacceptable safety or operational problems;
- 3) After reasonable mitigation, it still causes severe social, economic, or environmental impacts; severe disruption to established communities; severe or disproportionate impacts to minority or low-income populations; or severe impacts to environmental resources protected under other Federal statutes;
- 4) It results in additional construction, maintenance, or operational costs of extraordinary magnitude;
- 5) It causes other unique problems or unusual factors; or
- 6) It involves multiple factors as outlined above that, while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

The prudence determination involves an analysis that applies each of the six factors, if applicable, to the potential avoidance alternative. If a factor is not applicable FHWA

recommends simply noting that fact in the analysis.

Supporting documentation is required in the Section 4(f) evaluation for findings of no feasible and prudent alternatives (*See* 23 CFR 774.7(a)). Documentation of the process used to identify, develop, analyze and eliminate potential avoidance alternatives is very important. The Section 4(f) evaluation should describe all efforts in this regard. This description need not include every possible detail, but it should clearly explain the process that occurred and its results. It is appropriate to maintain detailed information in the project file with a summary in the Section 4(f) evaluation. If the information is especially voluminous, a technical report should be prepared, summarized, and referenced in the Section 4(f) evaluation. The discussion may be organized within the Section 4(f) evaluation in any manner that allows the reader to understand the full range of potential avoidance alternatives identified, the process by which potential avoidance alternatives were identified and analyzed for feasibility and prudence. Possible methods for organizing the discussion include a chronological discussion; a discussion organized geographically by project alternatives or project phases of construction; or by the type of Section 4(f) properties.

For larger highway projects with multiple Section 4(f) properties in the project area, it may be desirable to divide the analysis into a macro and a micro-level evaluation in order to distinguish the analysis of end-to-end project alternatives that avoid using any Section 4(f) property from the analysis of design options to avoid using a single Section 4(f) property. The macro-level evaluation would address any end-to-end avoidance alternatives that can be developed, as well as any alternative actions to the proposed highway project such as travel demand reduction strategies or enhanced transit service in the project area. The micro-level evaluation would then address, for each Section 4(f) property, whether the highway could be routed to avoid the property by shifting to the left or right, by bridging over, or tunneling under the property, or through another alignment shift or design change. The analysis may be presented in any manner that demonstrates, for each Section 4(f) property used, that there is no feasible and prudent avoidance alternative. Even if all of the alternatives use a Section 4(f) property, there is still a duty to try to avoid the individual Section 4(f) properties within each alternative.

### **3.3.3.2 Alternative with Least Overall Harm**

If the analysis described in the preceding section concludes that there is no feasible and prudent avoidance alternative, then FHWA may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that causes the least overall harm in light of the statute's preservation purpose. Pursuant to substantial case law, if the assessment of overall harm finds that two or more alternatives are substantially equal, FHWA can approve any of those alternatives. This analysis is required when multiple alternatives that use Section 4(f) property remain under consideration.

To determine which of the alternatives would cause the least overall harm, FHWA must compare seven factors set forth in 23 CFR 774.3(c)(1) concerning the alternatives under consideration. The first four factors relate to the net harm that each alternative

would cause to Section 4(f) property:

- 1) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);
- 2) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;
- 3) The relative significance of each Section 4(f) property; and
- 4) The views of the officials with jurisdiction over each Section 4(f) property.

When comparing the alternatives under these factors, FHWA policy is to develop comparable mitigation measures where possible. In other words, the comparison may not be skewed by over-mitigating one alternative while under-mitigating another alternative for which comparable mitigation could be incorporated. In addition, the mitigation measures relied upon as part of this comparison should be incorporated into the selected alternative. If subsequent design or engineering work occurs after the alternative is selected that requires changes to the mitigation plans for Section 4(f) property, FHWA may require revisions to previous mitigation commitments commensurate with the extent of design changes in accordance with 23 CFR 771.109(b) and (d), 127(b), 129, and 130.

The remaining three factors enable FHWA to take into account any substantial problem with any of the alternatives remaining under consideration on issues beyond Section 4(f). These factors are:

- 5) The degree to which each alternative meets the purpose and need for the project;
- 6) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and
- 7) Substantial differences in costs among the alternatives.

By balancing the seven factors, four of which concern the degree of harm to Section 4(f) properties, FHWA will be able to consider all relevant concerns to determine which alternative would cause the least overall harm in light of the statue's preservation purpose. The least overall harm balancing test is set forth in 774.3(c)(1). This allows FHWA to fulfill its statutory mandate to make project decisions in the best overall public interest required by 23 U.S.C. § 109(h). Through this balancing of factors, FHWA may determine that a serious problem identified in factors (v) through (vii) outweighs relatively minor net harm to a Section 4(f) property. The least overall harm determination also provides FHWA with a way to compare and select between alternatives that would use different types of Section 4(f) properties when competing assessments of significance and harm are provided by the officials with jurisdiction over the impacted properties. In evaluating the degree of harm to Section 4(f) properties, FHWA is required by the regulations to consider the views (if any) expressed by the official(s) with jurisdiction over each Section 4(f) property. If an official with jurisdiction states that all resources within that official's jurisdiction are of equal value, FHWA may still determine that the resources have different value if such a determination is supported by information in the project file. Also, if the officials with jurisdiction over two different properties provide conflicting assessments of the relative value of those

properties, FHWA should consider the officials' views but then make its own independent judgment about the relative value of those properties. Similarly, if the official(s) with jurisdiction decline to provide any input at all regarding the relative value of the affected properties, FHWA should make its own independent judgment about the relative value of those properties.

FHWA is required to explain how the seven factors were compared to determine the least overall harm alternative (*See* 23 CFR 774.7(c)). The draft Section 4(f) evaluation will disclose the various impacts to the different Section 4(f) properties thereby initiating the balancing process. It should also disclose the relative differences among alternatives regarding non-Section 4(f) issues such as the extent to which each alternative meets the project purpose and need. The disclosure of impacts should include both objective, quantifiable impacts and qualitative measures that provide a more subjective assessment of harm. Preliminary assessment of how the alternatives compare to one another may also be included. After circulation of the draft Section 4(f) evaluation in accordance with 23 CFR 774.5(a), FHWA will consider comments received on the evaluation and finalize the comparison of all factors listed in 23 CFR 774.3(c)(1) for all the alternatives. The analysis and identification of the alternative that has the overall least harm must be documented in the final Section 4(f) evaluation (*See* 23 CFR 774.7(c)). In especially complicated projects, the final approval to use the Section 4(f) property may be made in the decision document (ROD or FONSI).

### **3.4 Examples of Section 4(f) Approvals**

The table below describes five project alternative scenarios. In each project scenario various alternatives are considered and there are various options available to approve the use of the Section 4(f) property needed for the project. The examples illustrate the approval options as well as the point that in some situations FHWA may only approve a certain alternative. These examples are not intended to address every possible scenario.

In Project 1 there is a single build alternative A, for which FHWA determines the use to be a *de minimis* impact and therefore does not require an individual Section 4(f) evaluation. Once the coordination required by 23 CFR 774.5(b) is completed, FHWA may approve the *de minimis* impact and the applicant may proceed with the build alternative.

Project 2 has two alternatives. The FHWA determines that alternative A has a *de minimis* impact on one Section 4(f) property, and alternative B has a *de minimis* impact on three Section 4(f) properties. Upon completion of the coordination required by 23 CFR 774.5(b), FHWA may approve either alternative under Section 4(f). As in the previous example, an individual Section 4(f) evaluation is not required, therefore the feasibility and prudence of avoiding Section 4(f) properties does not have to be determined. Furthermore, when there are only *de minimis* impacts, even among multiple alternatives, a least harm analysis is not necessary and there is no need to compare the significance of the competing Section 4(f) properties. The process to choose between alternatives A or B in the second example may be based on non-Section 4(f) considerations as determined appropriate through the project development process.

In Project 3, there are three alternatives under consideration. The FHWA determines that alternative A meets the criteria of a *de minimis* impact, while alternative B has a minor impact on a Section 4(f) property for which the programmatic Section 4(f) evaluation for minor uses is applicable. Alternative C would use a Section 4(f) property to an extent that a *de minimis* impact determination is not possible and no programmatic Section 4(f) evaluation applies. In this example, all three alternatives use a Section 4(f) property and thus none can be considered to be an avoidance alternative. For this project, alternative A may proceed immediately once the coordination required by 23 CFR 774.5 is complete, through an approved *de minimis* impact determination. Alternative B may be approved by following the procedures designated in the applicable programmatic Section 4(f) evaluation, whose end result demonstrates no feasible and prudent avoidance alternative. However, in this example if the applicant favors alternative C, then an individual Section 4(f) evaluation can be prepared to consider whether or not alternative C can be approved under Section 4(f). The individual Section 4(f) evaluation first determines that there is no feasible and prudent avoidance alternative as defined in 23 CFR 774.17. The evaluation then considers which alternative (A, B, or C) has the least overall harm using the factors in 23 CFR 774.3(c). Alternative C could only be approved if it is identified as having the least overall harm, which would be possible; for example, if alternatives A and B both have severe impacts to an important non-Section 4(f) resource and the impacts of alternative C can be adequately mitigated. In that case, upon completion of the coordination required by 23 CFR 775.5(a) and all possible planning to minimize harm as defined in 23 CFR 774.17, alternative C could be approved.

Project 4 differs slightly in having multiple *de minimis* impacts to Section 4(f) properties with alternative A, and a mix of *de minimis* impacts and greater than *de minimis* impacts not covered by a programmatic section 4(f) evaluation with alternative B. If alternative A is chosen, FHWA would satisfy Section 4(f) by making a *de minimis* impact determination for each property used in accordance with 23 CFR 774.3(b), 774.5(b), and 774.7(c). To consider selecting alternative B, an individual Section 4(f) evaluation would be prepared in accordance with 23 CFR 774.3(a), 774.5(a), and 774.7(a); however, a determination of *de minimis* impact for a specific Section 4(f) property can be made without considering avoidance alternatives for that property, even if that use occurs as part of an alternative that also includes other uses that are greater than *de minimis*. In this example, an additional alternative C is developed as part of the Section 4(f) evaluation. Alternative C avoids using any Section 4(f) property, and the evaluation then determines, using the definition in 23 CFR 774.17, that alternative C is feasible and prudent. Alternative C may proceed immediately because it does not use any Section 4(f) property and no Section 4(f) approval is needed. In this example, since alternative C is a feasible and prudent avoidance alternative the FHWA may not approve alternative B, although alternative A would still be available for selection because its impacts on Section 4(f) properties are *de minimis*. However, if the facts are changed and we now assume that the evaluation of avoidance alternative C had found that it was not feasible and prudent, then the Section 4(f) evaluation could be completed. The evaluation would determine the least overall harm amongst alternatives A and B using the factors in 23 CFR 774.3(c). (In this variation of the example, the least overall harm determination



does not include alternative C in the comparison because alternative C was previously eliminated when it was found not to be feasible and prudent.) Alternative B could only be approved if it is identified as having the least overall harm. This would be possible, for example if alternative A would not meet the project purpose and need as well as alternative B, alternative A would be substantially more expensive, and the Section 4(f) property used by alternative B has no unusual significance and could be adequately mitigated. In that example, upon completion of the coordination required by 23 CFR 774.5(a) and all possible planning to minimize harm as defined in 23 CFR 774.17, alternative B could be approved even though it uses Section 4(f) property.

Project 5 has two alternatives, both having greater than *de minimis* impacts on a different Section 4(f) property. To choose among alternatives A and B, an individual Section 4(f) evaluation must be prepared in accordance with 23 CFR 774.3(a), 774.5(a), and 774.7(a) that demonstrates no feasible and prudent avoidance alternative exists, and a least overall harm analysis must be completed using the factors in 23 CFR 774.3(c). The alternative identified as having the least overall harm may proceed upon completion of the coordination required by 23 CFR 774.5(a) and all possible planning to minimize harm as defined in 23 CFR 774.17.

**Table 1. Project Alternative Scenarios**

ALTERNATIVE	USE OF SECTION 4(f) PROPERTY	INDIVIDUAL SECTION 4(f) EVALUATION?	OUTCOME
Project 1, alternative A	<i>De minimis</i> impact	Not necessary	May proceed with A
Project 2, alternative A	<i>De minimis</i> impact on one property	Not necessary	May proceed with A or B; Section 4(f) is not determinative
Project 2, alternative B	<i>De minimis</i> impact on three properties	Not necessary	
Project 3, alternative A	<i>De minimis</i> impact	Not necessary	May proceed with A or B; Section 4(f) is not determinative
Project 3, alternative B	Minor use, programmatic Section 4(f) evaluation is applicable	Not necessary	
Project 3, alternative C	Greater than <i>de minimis</i> impact	Necessary. If no feasible and prudent avoidance alternative is identified, then a least overall harm analysis would compare A, B, and C.	May proceed with C only if C has less overall harm than A or B.
Project 4, alternative A	<i>De minimis</i> impact on two properties	Not necessary	May proceed with A
Project 4, alternative B	<i>De minimis</i> impact on one property & greater than <i>de minimis</i> impact on another property	Necessary. As part of the evaluation, a new Alternative C is developed that avoids using Section 4(f) property.	If C is found feasible and prudent, cannot proceed with B. If C is not feasible and prudent, may proceed with

ALTERNATIVE	USE OF SECTION 4(f) PROPERTY	INDIVIDUAL SECTION 4(f) EVALUATION?	OUTCOME
			B only if B has less overall harm than A.
Project 4, alternative C	None	Not necessary to complete the Section 4(f) evaluation to proceed with C.	May proceed with C; no Section 4(f) approval is required.
Project 5, alternative A	Greater than <i>de minimis</i> impact	Necessary. The evaluation must seek to identify feasible and prudent avoidance alternatives. Assuming none are found, then a least harm analysis will compare A and B.	Least overall harm analysis determines which alternative, A or B, may proceed.
Project 5, alternative B	Greater than <i>de minimis</i> impact		

### 3.5 All Possible Planning to Minimize Harm

After determining that there are no feasible and prudent alternatives to avoid the use of Section 4(f) property, the project approval process for an individual Section 4(f) evaluation requires the consideration and documentation of all possible planning to minimize harm to Section 4(f) property (*See* 23 CFR 774.3(a)(2)). *All possible planning*, defined in 23 CFR 774.17, means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project. All possible planning to minimize harm does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under § 774.3(a)(1).

Minimization of harm may entail both alternative design modifications that reduce the amount of Section 4(f) property used and mitigation measures that compensate for residual impacts. Minimization and mitigation measures should be determined through consultation with the official(s) with jurisdiction. These include the SHPO and/or THPO for historic properties or officials owning or administering the resource for other types of Section 4(f) properties. Mitigation measures involving public parks, recreation areas, or wildlife or waterfowl refuges may involve a replacement of land and/or facilities of comparable value and function, or monetary compensation to enhance the remaining land. Neither the Section 4(f) statute nor regulations requires the replacement of Section 4(f) property used for highway projects, but this option may be the most straightforward means of minimizing harm to parks, recreation areas, and wildlife waterfowl refuges and is permitted under 23 CFR 710.509 as a mitigation measure for direct project impacts.

Mitigation of historic sites usually consists of those measures necessary to preserve the historic integrity of the site and agreed to in accordance with 36 CFR 800 by FHWA, the SHPO or THPO, and other consulting parties. In any case, the cost of mitigation should

be a reasonable public expenditure in light of the severity of the impact on the Section 4(f) property in accordance with 23 CFR 771.105(d). Additional laws such as Section 6(f) of the Land and Water Conservation Fund Act may have separate mitigation and approval requirements and compliance with such requirements should also be described within the Section 4(f) discussion of all possible planning to minimize harm.

#### **4.0 Documentation**

U.S. DOT departmental requirements for documenting Section 4(f) analysis and approvals (DOT Order 5610.1C) have been incorporated into FHWA regulations, guidance and policy. The FHWA's procedures regarding the preparation and circulation of Section 4(f) documents is contained in 23 CFR 774.5 and FHWA's Technical Advisory, T 6640.8A, Guidance for Preparing and Processing of Environmental and Section 4(f) Documents.<sup>10</sup>

The documentation of all Section 4(f) determinations, consultations, coordination and approvals is intended to establish a record of FHWA's compliance with the regulatory process. Documentation also provides evidence that the substantive requirements have been met. Section 4(f) documentation and processing requirements vary depending on the type of Section 4(f) property used and whether or not the use meets the criteria of a de minimis impact. However, all situations which involve Section 4(f) property will necessitate some degree of documentation: either in the NEPA document, a Section 4(f) evaluation, or the project file.

The project file is the agency's written record that memorializes the basis for determining that an impact is de minimis or that there is no feasible and prudent avoidance alternative to the use of the Section 4(f) property and that FHWA undertook all possible planning to minimize harm to Section 4(f) property. When the agency determines that Section 4(f) is not applicable to a particular resource, written documentation of that decision should be maintained as part of the project file. The project file should include all relevant correspondence which may include emails and other electronic information that is applicable to the decision-making process. The project file should generally be retained until three years after FHWA reimbursement on Federal-aid projects and three years after final payment on non-Federal aid projects (See FHWA Order M.1324.1A, 49 CFR 18.42, and 49 CFR 19.53).

#### ***De Minimis* Impact Determinations**

The *de minimis* impact determination must include sufficient supporting documentation to demonstrate that the impacts, after avoidance, minimization, mitigation, or enhancement measures are taken into account, are *de minimis* as defined in 23 CFR 774.17; and that the coordination required by 23 CFR 774.5(b) was completed.

Information related to the *de minimis* impact determination should be included in the project NEPA document (EA or EIS), or in the project file for a project processed as a CE (See 23 CFR 774.7(c)). Circulation of this information in the project NEPA document may

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<sup>10</sup> These and other resources are available at the FHWA Environmental Toolkit <http://environment.fhwa.dot.gov/index.asp>.

satisfy the public involvement requirements required for *de minimis* impact findings. For projects which include both *de minimis* impacts and use of Section 4(f) property with more than a *de minimis* impact, the determination and supporting data should be included in a separate section of the Section 4(f) evaluation.

### **Applying Programmatic Section 4(f) Evaluations**

Information related to an approval to use Section 4(f) property by applying a programmatic Section 4(f) evaluation should be included in the project NEPA document (EA or EIS), or in the project file for a project processed as a CE. For projects which include both a programmatic Section 4(f) approval and a use of Section 4(f) property for which there is more than a *de minimis* impact, information regarding the application of the programmatic Section 4(f) evaluation should be included in a separate section of the Section 4(f) evaluation.

The project file should include sufficient supporting documentation to demonstrate that the programmatic evaluation being relied upon applies to the use of the specific Section 4(f) property. In addition, the project file should include documentation that the coordination required by the applicable programmatic evaluation was completed and that all specific conditions of the applicable programmatic evaluation were met.

### **Individual Section 4(f) Evaluations**

Individual Section 4(f) evaluations must include sufficient analysis and supporting documentation to demonstrate that there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm (23 CFR 774.7(a)). For projects requiring a least overall harm analysis under 23 CFR 774.3(c), that analysis must be included within the individual Section 4(f) evaluation (23 CFR 774.7(c)).

Individual Section 4(f) evaluations are processed in two distinct stages: draft and final. Draft evaluations must be circulated to the U.S. DOI and shared with the official(s) with jurisdiction. The public may review and comment on a draft evaluation during the NEPA process. When a project is processed as a CE the Section 4(f) evaluation must be circulated independently to the U.S. DOI. In all cases, final Section 4(f) evaluations are subject to FHWA legal sufficiency review prior to approval (23 CFR 774.5(d)).

### **Project Files**

In general, the project file should contain the following essential information, with analysis, regarding Section 4(f):

- When making *de minimis* impact determinations
  - 1) Applicability or non-applicability of Section 4(f) to the park, recreation, refuge or historic property proposed to be used by the project;
  - 2) Whether or not there is a use of section 4(f) property;
  - 3) Records of public involvement, or Section 106 consultation;
  - 4) Results of coordination with the officials with jurisdiction;
  - 5) Comments submitted during the coordination procedures required by 23 CFR 774.5 and responses to the comments; and

- 6) Avoidance, minimization or mitigation measures that were relied upon to make the *de minimis* impact finding.
- When applying programmatic Section 4(f) evaluations
    - 1) Applicability or non-applicability of Section 4(f) to the park, recreation, refuge or historic property proposed to be used by the project;
    - 2) Whether or not there is a use of section 4(f) property;
    - 3) Records of public involvement, if any;
    - 4) Results of coordination with the officials with jurisdiction; and
    - 5) Documentation of the specific requirements of the programmatic evaluation that is being applied.
  - When preparing an individual Section 4(f) evaluation
    - 1) Applicability or non-applicability of Section 4(f) to the park, recreation, refuge or historic property proposed to be used by the project;
    - 2) Whether or not there is a use of Section 4(f) property;
    - 3) Activities, features, and attributes of the Section 4(f) property;
    - 4) Analysis of the impacts to the Section 4(f) property;
    - 5) Records of public involvement;
    - 6) Results of coordination with the officials with jurisdiction;
    - 7) Alternatives considered to avoid using the Section 4(f) property, including analysis of the impacts caused by avoiding the Section 4(f) property;
    - 8) A least overall harm analysis, if appropriate;
    - 9) All measures undertaken to minimize harm to the Section 4(f) property;
    - 10) Comments submitted during the coordination procedures required by 23 CFR 774.5 and responses to the comments; and
    - 11) Results of the internal legal sufficiency review.

### **Administrative Records**

If a Section 4(f) approval is legally challenged, the project file will be the basis of the administrative record that must be filed in the court for review. The administrative record will be reviewed in accordance with the *Administrative Procedure Act* (APA), (5 U.S.C. §706 (2)(A)), which provides judicial deference to U.S. DOT actions. Under the APA, the agency's action must be upheld unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The court will review the administrative record to determine whether FHWA complied with the essential elements of Section 4(f). If an inadequate administrative record is prepared, the court will lack the required Section 4(f) documentation to review and, therefore, will be unable to defer to FHWA's decision, especially when a Section 4(f) evaluation was not required. While agency decisions are entitled to a presumption of regularity and the courts are not empowered to substitute their judgment for that of the agency, judges will carefully review whether FHWA followed the applicable requirements.

## **PART II – QUESTIONS AND ANSWERS REGARDING SECTION**

## **4(f) APPLICABILITY AND COMPLIANCE**

The following questions and answers are intended to provide additional and detailed guidance for complying with the requirements of Section 4(f). Examples to aid in determining the applicability of Section 4(f) to various types of property and project situations are included. These examples represent FHWA's policy regarding Section 4(f) compliance for situations most often encountered in the project development process. Since it is impossible to address every situation that could occur, it is recommended that the FHWA Division Office be consulted for advice and assistance in determining the applicability of Section 4(f) to specific circumstances not covered in this paper. The FHWA Division Offices are encouraged to consult with the Headquarters Office of Project Development and Environmental Review, the Resource Center Environment Technical Services Team and/or the Office of the Chief Counsel in cases where additional assistance in Section 4(f) matters is required.

### **IDENTIFICATION OF SECTION 4(f) PROPERTIES**

#### **1. Public Parks, Recreation Areas and Wildlife and Waterfowl Refuges**

**Question 1A: When is publicly owned land considered to be a park, recreation area or wildlife and waterfowl refuge?**

**Answer:** Publicly owned land is considered to be a park, recreation area or wildlife and waterfowl refuge when the land has been officially designated as such by a Federal, State or local agency, and the officials with jurisdiction over the land determine that its primary purpose is as a park, recreation area, or refuge. Primary purpose is related to a property's primary function and how it is intended to be managed. Incidental, secondary, occasional or dispersed activities similar to park, recreational or refuge activities do not constitute a primary purpose within the context of Section 4(f). Unauthorized activities, such as ad hoc trails created by the public within a conservation area, should not be considered as part of FHWA's determination of Section 4(f) applicability.

In addition, the statute itself requires that a property must be a significant public park, recreation area, or wildlife and waterfowl refuge. The term significant means that in comparing the availability and function of the park, recreation area or wildlife and waterfowl refuge, with the park, recreation or refuge objectives of the agency, community or authority, the property in question plays an important role in meeting those objectives. Except for certain multiple-use land holdings (Question 4), significance determinations are applicable to the entire property and not just to the portion of the property proposed for use by a project.

Significance determinations of publicly owned land considered to be a park, recreation area, or wildlife and waterfowl refuge are made by the official(s) with jurisdiction over the property. The meaning of the term significance, for purposes of Section 4(f), should be explained to the official(s) with jurisdiction if the

official(s) are not familiar with Section 4(f). Management plans or other official forms of documentation regarding the land, if available and up-to-date, are important and should be obtained from the official(s) and retained in the project file. If a determination from the official(s) with jurisdiction cannot be obtained, and a management plan is not available or does not address the significance of the property, the property will be presumed to be significant. However, all determinations, whether stated or presumed, and whether confirming or denying significance of a property for the purposes of Section 4(f), are subject to review by FHWA for reasonableness pursuant to 23 CFR 774.11. When FHWA changes a determination of significance, the basis for this determination will be included in the project file and discussed in the environmental documentation for the proposed action.

**Question 1B: Can an easement or other encumbrance on private property result in that property being subject to Section 4(f)?**

**Answer:** Yes, in certain instances. Generally, an easement is the right to use real property without possessing it, entitling the easement holder to the privilege of some specific and limited use of the land. Easements take many forms and are obtained for a variety of purposes by different parties. Easements or similar encumbrances restricting a property owner from making certain uses of his/her property, such as conservation easements, are commonly encountered during transportation project development. Easements such as these often exist for the purpose of preserving open space, protection of habitat, or to limit the extent and density of development in a particular area, and they may be held by Federal, State or local agencies or non-profit groups or other advocacy organizations.

Although a conservation easement may not meet all of the requirements necessary to treat the property as a significant publicly-owned public park, recreation area, or wildlife and waterfowl refuge, it is a possibility that mandates careful case-by-case consideration when encountered. The terms of the easement should be carefully examined to determine if Section 4(f) applies to the property. Factors to consider include, but are not limited to, the views of the official(s) with jurisdiction, the purpose of the easement, the term of the easement, degree of public access to the property, how the property is to be managed and by whom, what parties obtained the easement (public agency or non-public group), termination clauses, and what restrictions the easement places on the property owner's use of the easement area. Questions on whether or not an easement conveys Section 4(f) status to a property should be referred to the FHWA Division Office and, if necessary, the Division Office should consult with the Headquarters Office of Project Development and Environmental Review, the Headquarters Office of Real Estate Services, the Resource Center Environment Technical Service Team, or the Office of Chief Counsel.

Easements and deed restrictions for the purpose of historic preservation are also commonly encountered during transportation project development. Section 4(f) applicability questions are unlikely to be encountered for these properties because if the property is not on or eligible for the NR Section 4(f) does not apply,

notwithstanding the preservation easement. If the property is on or eligible for the NR, Section 4(f) applies. However, the existence and nature of such easements should be documented and considered as necessary within the feasible and prudent analysis and least harm analysis if a Section 4(f) evaluation is prepared.

**Question 1C: When does a lease agreement with a governmental body constitute public ownership?**

**Answer:** In some instances, a lease agreement between a private landowner and a governmental body may constitute a proprietary interest in the land for purposes of Section 4(f). Generally, under a long term lease to a governmental body, such land may be considered to be “publicly owned” land and if the property is being managed by the governmental body as a significant public park, recreation area, or wildlife and waterfowl refuge then a use of the property will be subject to the requirements of Section 4(f). Such lease agreements should be examined on a case-by-case basis with consideration of such factors as the term of the lease, the understanding of the parties to the lease, the existence of a cancellation clause, and how long the lease has been in place. Questions on whether or not the leasehold constitutes public ownership should be referred to the FHWA Division Office, and if necessary the Division Office should consult with the Headquarters Office of Project Development and Environmental Review, the Resource Center Environment Technical Service Team, or the Office of Chief Counsel. If FHWA determines that the lease agreement creates a proprietary interest that is equivalent to public ownership, FHWA must then determine whether the property is in fact being managed by the government body as a significant public park, recreation area, or wildlife and waterfowl refuge. If so, the property is subject to Section 4(f).

**Question 1D: Are significant publicly owned parks and recreation areas that are not open to the general public subject to the requirements of Section 4(f)?**

**Answer:** The requirements of Section 4(f) would apply if the entire public park or public recreation area permits visitation of the general public at any time during the normal operating hours. Section 4(f) would not apply when visitation is permitted to a select group only and not to the entire public. Examples of select groups include residents of a public housing project; military service members and their dependents; students of a public school; and students, faculty, and alumni of a public college or university (*See* Question 18B). The FHWA does, however, strongly encourage the preservation of such parks and recreation areas even though they may not be open to the general public or are not publicly owned and therefore are not protected by Section 4(f).

It should be noted that wildlife and waterfowl refuges have not been included in this discussion. Many wildlife and waterfowl refuges allow public access, while others may restrict public access to certain areas within the refuge or during certain times or seasons of the year for the protection of refuge habitat or species. In these cases, the property should be examined by the FHWA Division Office to verify that the



primary purpose of the property is for wildlife and waterfowl refuge activities and not for other non-Section 4(f) activities, and that the restrictions on public access are limited to measures necessary to protect refuge habitat or species. If it is determined that the primary purpose of the property is for wildlife and waterfowl refuge activities and that the restrictions on public access are limited to the measures necessary to protect the refuge habitat or species, then the property is subject to Section 4(f) notwithstanding the access restriction.

**Question 1E: What is a wildlife and waterfowl refuge for purposes of Section 4(f)?**

**Answer:** The term wildlife and waterfowl refuge is not defined in the Section 4(f) law. On the same day in 1966 that Section 4(f) was passed, Congress also passed the *National Wildlife Refuge System Administration Act* (Pub. L. 89-669, 80 Stat. 926) to provide for the conservation, protection, and propagation of native species of fish and wildlife, including migratory birds, that are threatened with extinction; to consolidate the authorities relating to the administration by the Secretary of the Interior of the National Wildlife Refuge System; and for other purposes. The Refuge System referred to in that Act includes areas that were designated as wildlife refuges and waterfowl refuges.<sup>11</sup> FHWA has considered this contemporaneous legislation in our implementation of Section 4(f) regarding refuges. For purposes of Section 4(f), National Wildlife Refuges<sup>12</sup> are always considered wildlife and waterfowl refuges by FHWA in administering Section 4(f); therefore no individual determination of their Section 4(f) status is necessary. In addition, any significant publicly owned public property (including waters) where the primary purpose of such land is the conservation, restoration, or management of wildlife and waterfowl resources including, but not limited to, endangered species and their habitat is considered by FHWA to be a wildlife and waterfowl refuge for purposes of Section 4(f).

In determining the primary purpose of the land, consideration should be given to:

- 1) The authority under which the land was acquired;
- 2) Lands with special national or international designations;
- 3) The management plan for the land; and,
- 4) Whether the land has been officially designated, by a Federal, State, or local agency with jurisdiction over the land, as an area whose primary purpose and function is the conservation, restoration, or management of wildlife and waterfowl

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<sup>11</sup> The *National Wildlife Refuge System* is currently comprised of the various categories of areas that are administered by the Secretary for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas (16 U.S.C. § 668dd(a)(1)).

<sup>12</sup> The DOI's regulations state: "All national wildlife refuges are maintained for the primary purpose of developing a national program of wildlife and ecological conservation and rehabilitation. These refuges are established for the restoration, preservation, development and management of wildlife and wildlands habitat; for the protection and preservation of endangered or threatened species and their habitat; and for the management of wildlife and wildlands to obtain the maximum benefits from these resources" (50 CFR 25.11(b)).

resources including, but not limited to, endangered species and their habitat.

Many refuge-type properties permit recreational activities that are generally considered not to conflict with species conservation, such as trails, wildlife observation and picnicking. Other activities, such as educational programs, hunting, and fishing, may also be allowed when the activity is consistent with the broader species conservation goals for the property.

Examples of properties that may function as wildlife and waterfowl refuges for purposes of Section 4(f) include: State or Federal wildlife management areas, a wildlife reserve, preserve or sanctuary; and waterfowl production areas including wetlands and uplands that are permanently set aside (in a form of public ownership) primarily for refuge purposes. The FHWA should consider the ownership, significance, function and primary purpose of such properties in determining if Section 4(f) will apply. In making the determination, the FHWA should review the existing management plan and consult with the Federal, State or local official(s) with jurisdiction over the property. In appropriate cases, these types of properties will be considered multiple-use public land holdings (*See* 23 CFR 774.11(d) and Question 4) and must be treated accordingly.

The U.S. DOI administers a variety of Federal grant programs in support of hunting, fishing, and related resource conservation. While the fact that a property owned by a State or local government has at some time in the past been the beneficiary of such a grant does not automatically confer Section 4(f) status, the existence and terms of such a prior grant, when known, should be considered along with the other aspects of the property described above when determining if the property should be treated as a wildlife and waterfowl refuge for purposes of Section 4(f). Finally, it should be noted that sites purchased as mitigation for transportation projects (e.g., for endangered species impacts) can be considered refuges for purposes of Section 4(f) if the mitigation sites meet all of the applicable criteria for Section 4(f) status as a refuge, including public ownership and access, significance, and functioning primarily as a refuge.

## **2. Historic Sites**

### **Question 2A: How is Section 4(f) significance of historic sites determined?**

**Answer:** *Historic site* is defined in 23 CFR 774.17. For purposes of Section 4(f), a historic site is significant only if it is on or eligible for the NR. Pursuant to the NHPA, FHWA in cooperation with the applicant consults with the SHPO and/or THPO, tribes that may attach religious and cultural significance to the property, and when appropriate, with local officials to determine whether a site is eligible for the NR. In case of disagreement between FHWA and the SHPO/THPO or if so requested by the ACHP, FHWA shall request a determination of eligibility from the Keeper of the NR (36 CFR 800.4(c)(2)). Any third party may also seek the involvement of the Keeper by asking the ACHP to request that the Federal agency seek a determination of

eligibility.

If a site is determined not to be on or eligible for the NR, FHWA still may determine that the application of Section 4(f) is appropriate when an official (such as the Mayor, president of the local historic society, etc.) formally provides information to indicate that the historic site is of local significance. In rare cases such as this, FHWA may determine that it is appropriate to apply Section 4(f) to that property. In the event that Section 4(f) is found inapplicable, the FHWA Division Office should document the basis for not applying Section 4(f). Such documentation might include the reasons why the historic site was not eligible for the NR.

**Question 2B: How does Section 4(f) apply in historic districts that are on or eligible for the NR?**

**Answer:** Within a NR listed or eligible historic district, FHWA's long-standing policy is that Section 4(f) applies to those properties that are considered contributing to the eligibility of the historic district, as well as any individually eligible property within the district. Elements within the boundaries of a historic district are assumed to contribute, unless they are determined by FHWA in consultation with the SHPO/THPO not to contribute (*See also* Question 7C).

**Question 2C: How should the boundaries of a property eligible for listing on the NR be determined where a boundary has not been established?**

**Answer:** In this situation, FHWA makes the determination of a historic property's boundary under the regulations implementing Section 106 of the NHPA in consultation with the SHPO/THPO. The identification of historic properties and the determination of boundaries should be undertaken with the assistance of qualified professionals during the early stages of the NEPA process. This process should include the collection, evaluation and presentation of the information to document FHWA's determination of the property boundaries. The determination of eligibility, which would include boundaries of the site, rests with FHWA, but if the SHPO or THPO objects, or if the ACHP or the Secretary of the Interior so requests, then FHWA shall obtain a determination from the Keeper of the NR (36 CFR 800.4(c)(2)).

Selection of boundaries is a judgment based on the nature of the property's significance, integrity, setting and landscape features, functions and research value. Most boundary determinations will take into account the modern legal boundaries, historic boundaries (identified in tax maps, deeds, or plats), natural features, cultural features and the distribution of resources as determined by survey and testing for subsurface resources. Legal property boundaries often coincide with the proposed or eligible historic site boundaries, but not always and, therefore, should be individually reviewed for reasonableness. The type of property at issue, be it a historic building, structure, object, site or district and its location in either urban, suburban or rural areas, should include the consideration of various and differing factors set out in the *National Park Service Bulletin: Defining Boundaries for National Register*

*Properties.*<sup>13</sup>

**Question 2D: How do you reconcile the phased approach to identification and evaluation and treatment of historic properties under Section 106 of the NHPA with the timing for the completion of Section 4(f) requirements?**

**Answer:** Compliance with Section 4(f) requires FHWA to carry out a reasonable level of effort to identify historic properties prior to issuing a Section 4(f) approval. The reasonableness of the level of effort depends upon the anticipated effects of the project and nature of likely historic resources present in the affected project area. Accordingly, the reasonable level of effort varies from project to project. While a visual survey may be necessary to identify above ground resources, it may be possible to rule out the likelihood for the presence of significant below ground resources based on literature review, prior studies of the area, consultation with consulting parties (e.g., Indian tribes) and factors that relate to archeological preservation such as soil and slope types. If a phased approach to identification and evaluation of historic properties is adopted pursuant to the Section 106 regulations, the methodology for that approach should be coordinated with FHWA to ensure that it will also satisfy Section 4(f) requirements.

You may be able to establish without carrying out a field survey that there is little or no potential for the presence of archeological resources that have value for preservation in place, and therefore are subject to Section 4(f). The project file should include documentation of the level of effort and justification for the conclusion that it is unlikely that there are additional unrecorded historic properties that could be subject to Section 4(f). A Memorandum of Agreement or project specific Programmatic Agreement focusing on a process for subsequent compliance should be executed prior to project approval. Those agreements may provide for the completion of additional identification and evaluation (e.g., archeological resource studies), assessment of effects, and refinement of mitigation measures after NEPA is approved.

**Question 2E: How are National Historic Landmarks (NHL) treated under Section 4(f)?**

**Answer:** Section 4(f) requirements related to the potential use of an NHL designated by the Secretary of Interior are essentially the same as they are for any historic property determined eligible under the Section 106 process, except that the July 5, 1983 *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges* may not be relied upon to approve the use of a historic bridge that is an NHL.

Section 110(f) of the NHPA (16 U.S.C. § 470-h-2) outlines the specific actions that an Agency must take when a NHL may be directly and adversely affected by an undertaking. Agencies must, "to the maximum extent possible...minimize harm" to

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<sup>13</sup> <http://www.cr.nps.gov/nr/publications/bulletins/boundaries>

the NHL affected by an undertaking. While not expressly stated in the Section 4(f) statute or regulations, the importance and significance of the NHL should be considered in the FHWA's Section 4(f) analysis of least overall harm pursuant to 23 CFR 774.3(c)(1)(iii). In addition, where there is a potential adverse effect to an NHL determined under the Section 106 process, the Secretary of Interior must be notified and given the option to participate in the Section 106 process. When the U.S. DOI has elected to participate, their representative (typically, the National Park Service) should be recognized as an additional official with jurisdiction and included in the required coordination in the course of the Section 4(f) process.

### **3. Archeological Resources**

#### **Question 3A: When does Section 4(f) apply to archeological sites?**

**Answer:** Section 4(f) applies to archeological sites that are on or eligible for the NR and that warrant preservation in place, including those sites discovered during construction as discussed in Question 3B. Section 4(f) does not apply if FHWA determines, after consultation with the SHPO/THPO, federally recognized Indian tribes (as appropriate), and the ACHP (if participating) that the archeological resource is important chiefly because of what can be learned by data recovery (even if it is agreed not to recover the resource) and has minimal value for preservation in place, and the SHPO/THPO and ACHP (if participating) does not object to this determination (*See* 23 CFR 774.13(b)). The destruction of a significant archaeological resource without first recovering the knowledge of the past inherent in that resource should not be taken lightly. Efforts to preserve the resource or develop and execute a data recovery plan should be addressed in the Section 106 process.

#### **Question 3B: How are archeological sites discovered during construction of a project handled?**

**Answer:** When archeological sites are discovered during construction (23 CFR 774.9(e) and 11(f)), FHWA must determine if an approval is necessary or if an exception applies under 23 CFR 774.13(c) (*See* Question 26). Where preservation in place is warranted and a Section 4(f) approval would be required, the Section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take into account the level of investment already made. The review process, including the consultation with other agencies should be shortened, as appropriate consistent with the process set forth in Section 106 of the NHPA regulations and should include Indian tribes that may attach religious and cultural significance to sites discovered (36 CFR 800.13). Discoveries may be addressed prior to construction in agreement documents that set forth procedures that plan for subsequent discoveries. When discoveries occur without prior planning, the Section 106 regulation calls for reasonable efforts to avoid, minimize, or mitigate such sites and provides an expedited timeframe for interested parties to reach resolution regarding treatment of the site. A decision to apply Section 4(f), based on the outcome of the Section 106 process, to an archeological discovery during

construction would trigger an expedited Section 4(f) evaluation. Because the U.S. DOI has a responsibility to review individual Section 4(f) evaluations and is not usually a party to the Section 106 process, the U.S. DOI should be notified and any comments they provide considered within a shortened response period.

**Question 3C: How do the Section 4(f) requirements apply to archaeological districts?**

**Answer:** Section 4(f) requirements apply to archeological districts in the same way they apply in historic districts, but only where preservation in place is warranted. There would not be a Section 4(f) use if, after consultation with the SHPO/THPO, FHWA determines that the project would use only a part of the archaeological district which is considered a non-contributing element of that district or that the project occupies only a part of the district which is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. As with a historic district, if the project does not use any individual contributing element of the archeological district which is significant for preservation in place and FHWA determines that the project will result in an adverse effect, then FHWA must consider whether or not the proximity impacts will result in a constructive use in accordance with 23 CFR 774.15.

**4. Public Multiple-Use Land Holdings**

**Question 4: Are multiple-use public land holdings (e.g., National Forests, State Forests, Bureau of Land Management lands) subject to the requirements of Section 4(f)?**

**Answer:** When applying Section 4(f) to multiple-use public land holdings, FHWA must comply with 23 CFR 774.11(d). Section 4(f) applies only to those portions of a multiple-use public property that are designated by statute or identified in an official management plan of the administering agency as being primarily for public park, recreation, or wildlife and waterfowl refuge purposes, and are determined to be significant for such purposes. Section 4(f) will also apply to any historic sites within the multiple-use public property that are on or eligible for the NR. Multiple-use public land holdings are often vast in size, and by definition these properties are comprised of multiple areas that serve different purposes. Section 4(f) does not apply to those areas within a multiple-use public property that function primarily for any purpose other than significant park, recreation or refuge purposes. For example, within a National Forest, there can be areas that qualify as Section 4(f) resources (e.g. campgrounds, trails, picnic areas) while other areas of the property function primarily for purposes other than park, recreation or a refuge such as timber sales or mineral extraction. Coordination with the official(s) with jurisdiction and examination of the management plan for the area will be necessary to determine if Section 4(f) should apply to an area of a multiple-use property that would be used by a transportation project.

For multiple-use public land holdings which either do not have formal management plans or when the existing formal management plan is out-of-date, FHWA will examine how the property functions and how it is being managed to determine Section 4(f) applicability for the various areas of the property. This review will include coordination with the official(s) with jurisdiction over the property.

## **5. Tribal Lands and Indian Reservations**

### **Question 5: How are lands owned by Federally Recognized Tribes, and/or Indian Reservations treated for the purposes of Section 4(f)?**

**Answer:** Federally recognized Indian Tribes are sovereign nations and the land owned by them is not considered publicly owned within the meaning of Section 4(f). Therefore, Section 4(f) does not automatically apply to tribal land. In situations where it is determined that the property or resource owned by a Tribal Government or within an Indian Reservation functions as a significant public park, recreational area, or wildlife and waterfowl refuge (which is open to the general public), or is eligible for the NR, the land would be considered Section 4(f) property.

## **6. Traditional Cultural Places (TCPs)**

### **Question 6: Are lands that are considered to be traditional cultural places subject to the provisions of Section 4(f)?**

**Answer:** A TCP is defined generally as land that may be eligible for inclusion in the NR because of its association with cultural practices or beliefs of a living community that; (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community.<sup>14</sup> Land referred to as a TCP is not automatically considered historic property, or treated differently from other potentially historic property. A TCP must also meet the NR criteria as a site, structure, building, district, or object to be eligible under Section 106, and thus for Section 4(f) protection. For those TCPs of significance to an Indian tribe or Native Hawaiian Organization (NHO), the THPO or designated representative of the Indian tribe or NHO should be acknowledged as possessing special expertise to assess the NR eligibility of the resources that possess religious and cultural significance to them. TCPs may be eligible under multiple criteria and therefore should not be presumed to be eligible only as archeological resources (*See* 23 CFR 774.11(e)).

## **USE OF SECTION 4(f) PROPERTIES**

### **7. Use of Section 4(f) Property**

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<sup>14</sup> For more information on the subject of TCPs see National Register Bulletin #38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*  
<http://www.nps.gov/history/NR/publications/bulletins/nrb38/nrb38.pdf>

**Question 7A: What constitutes a transportation use of property from publicly owned public parks, public recreation areas, wildlife and waterfowl refuges and public or privately owned historic sites?**

**Answer:** A use of Section 4(f) property is defined in 23 CFR 774.17. A use occurs when:

- 1) Land is permanently incorporated into a transportation facility;
- 2) There is a temporary occupancy of land that is adverse in terms of the Section 4(f) statute's preservationist purposes; or
- 3) There is a constructive use of a Section 4(f) property.

**Permanent Incorporation:** Land is considered permanently incorporated into a transportation project when it has been purchased as right-of-way or sufficient property interests have otherwise been acquired for the purpose of project implementation. For example, a permanent easement required for the purpose of project construction or that grants a future right of access onto a Section 4(f) property, such as for the purpose of routine maintenance by the transportation agency, would be considered a permanent incorporation of land into a transportation facility.

**Temporary Occupancy:** Examples of temporary occupancy of Section 4(f) land include right-of-entry, project construction, a temporary easement, or other short-term arrangement involving a Section 4(f) property. A temporary occupancy will not constitute a Section 4(f) use when all of the conditions listed in 23 CFR 774.13(d) are satisfied:

- 1) Duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land;
- 2) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the Section 4(f) property are minimal;
- 3) There are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, features, or attributes of the property, on either a temporary or permanent basis;
- 4) The land being used must be fully restored, i.e., the property must be returned to a condition which is at least as good as that which existed prior to the project; and
- 5) There must be documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.

In situations where the above criteria cannot be met, the temporary occupancy will be a use of Section 4(f) property and the appropriate Section 4(f) analysis, coordination, and documentation will be required (*See* 23 CFR 774.13(d)). In those cases where a temporary occupancy constitutes a use of Section 4(f) property and the *de minimis* impact criteria (Questions 10 and 11) are also met, a *de minimis* impact finding may be made. *De minimis* impact findings should not be made in temporary occupancy situations that do not constitute a use of Section 4(f) property.



**Constructive Use:** FHWA must comply with 23 CFR 774.15 to determine whether or not there is a constructive use of Section 4(f) property. Constructive use of Section 4(f) property is only possible in the absence of a permanent incorporation of land or a temporary occupancy of the type that constitutes a Section 4(f) use. Constructive use occurs when the proximity impacts of a project on an adjacent or near-by Section 4(f) property, after incorporation of impact mitigation, are so severe that the activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs when the protected activities, features, or attributes of the Section 4(f) property are substantially diminished. As a general matter this means that the value of the resource, in terms of its Section 4(f) purpose and significance (Questions 1 and 2), will be meaningfully reduced or lost. The degree of impact and impairment must be determined in consultation with the officials with jurisdiction in accordance with 23 CFR 774.15(d)(3). In those situations where a potential constructive use can be reduced below a substantial impairment by the inclusion of mitigation measures, there will be no constructive use and Section 4(f) will not apply.

The Section 4(f) regulations identify specific project situations where constructive use would and would not occur. The impacts of projects adjacent to or in reasonable proximity of Section 4(f) property should be carefully examined early in the NEPA process pursuant to 23 CFR Part 771. If it is determined that the proximity impacts do not cause a substantial impairment, FHWA can reasonably conclude that there will be no constructive use. The analysis of proximity impacts and potential constructive use should be documented in the project file. Documentation of a finding of *no constructive use* should apply the legal standards and terminology used in 23 CFR 774.15, *Constructive Use Determinations*. The use of the term “constructive use” is not required in such documentation, but should be used when appropriate – for example, when responding to comments in NEPA documents that specifically address constructive use, or where it is useful in demonstrating that FHWA has specifically considered the potential for a constructive use. Where a constructive use determination seems likely, the FHWA Division Office is required by the Administrator’s delegation of Section 4(f) authority to consult with the Headquarters Office of Project Development and Environmental Review before the determination is finalized.

Since a *de minimis* impact finding can only be made where the transportation use does not adversely affect the activities, features, or attributes that qualify a property for protection under Section 4(f), a *de minimis* impact finding is inappropriate where a project results in a constructive use (See 23 CFR 774.3(b) and the definition of *de minimis* impact in 774.17).

**Question 7B: Does Section 4(f) apply when there is an adverse effect determination under the regulations implementing Section 106 of the NHPA?**

**Answer:** FHWA’s determination of adverse effect under the Section 106 process (See 36 CFR 800.5) does not automatically mean that Section 4(f) will apply. Nor

does a determination of no adverse effect mean that Section 4(f) will not apply in some cases. When a project permanently incorporates land of a historic site, regardless of the Section 106 determination, Section 4(f) will apply. If a project does not permanently incorporate land from the historic property but results in an adverse effect, it will be necessary for FHWA to further assess the proximity impacts of the project in terms of the potential for constructive use (Question 7A). This analysis is necessary to determine if the proximity impact(s) substantially impair the features or attributes that contribute to the NR eligibility of the historic site. If there is no substantial impairment, notwithstanding an adverse effect determination, there is no constructive use and Section 4(f) does not apply. The FHWA determines if there is a substantial impairment by consulting with all identified officials with jurisdiction, including the SHPO/THPO and the ACHP if participating, to identify the activities, features, and attributes of the property that qualify it for Section 4(f) protection and by analyzing the proximity impacts of the project (including any mitigation) on those activities, features, and attributes (*See* 23 CFR 774.15(d)(3)). The determination of Section 4(f) applicability is ultimately FHWA's decision, and the considerations and consultation that went into that decision should be documented in the project file.

An example of a situation in which there is a Section 106 adverse effect but no Section 4(f) use, is a proposed transportation enhancement project that would convert a historic railroad depot into a tourist center. For public use, the project will require consistency with the American with Disabilities Act (ADA). The incorporation of accessible ramps or elevator may result in a determination of adverse effect; however, there is no permanent incorporation of Section 4(f) land into a transportation facility. The FHWA may determine, after consultation with the SHPO/THPO on the historic attributes and impacts thereto, that the project will not substantially impair the attributes of the historic property. There would not be a Section 4(f) use in this case. There would be a Section 4(f) use only if land from the property is either incorporated into a transportation facility or if the property is substantially impaired.

Another example of an adverse effect where there is no Section 4(f) use might be construction of a new highway within the immediate view shed of a historic farmstead that results in an adverse effect finding under Section 106 for the diminishment of the setting. It is unlikely this visual intrusion would reach the threshold of substantial impairment of the attributes which cause the farmstead to be eligible for the NR as it would still retain its historic fabric and use features; however, a constructive use could occur where the proximity of the proposed project substantially impairs esthetic features or attributes of a property protected by Section 4(f), where such features or attributes are considered important contributing elements to the value of the property.

An example of a Section 4(f) use without a Section 106 adverse effect involves a project on existing alignment, which proposes minor modification at an intersection. To widen the roadway sufficiently a small amount of land from an adjacent historic site will be acquired. The land acquisition does not alter the integrity of the historic site

and the SHPO concurs in FHWA's determination of no adverse effect. Even though under Section 106 there is no adverse effect, land from the site will be permanently incorporated into the transportation facility and Section 4(f) will apply. The use would likely qualify as a *de minimis* impact or may be approved using the *Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites*<sup>15</sup> depending on the circumstances of the project.

**Question 7C: How is a Section 4(f) use determined in historic districts?**

**Answer:** When a project requires land from a non-historic or non-contributing property lying within a historic district and does not use other land within the historic district that is considered contributing to its historic significance, FHWA's longstanding policy is that there is no direct use of the historic district for purposes of Section 4(f). With respect to constructive use, if the Section 106 consultation results in a determination of no historic properties affected or no adverse effect, there is no Section 4(f) constructive use of the district as a whole. If the project requires land from a non-historic or non-contributing property, and the Section 106 consultation results in a determination of adverse effect to the district as a whole, further assessment is required pursuant to 23 CFR 774.15 to determine whether or not there will be a constructive use of the district. If the use of a non-historic property or non-contributing element substantially impairs the activities, features, or attributes that are related to the NR eligibility of the historic district, then Section 4(f) would apply. In any case, appropriate steps, including consultation with the SHPO/THPO on the historic attributes of the district and impacts thereto, should be taken to establish whether the property is contributing or non-contributing to the district and whether its use would substantially impair the historic attributes of the historic district.

For example, an intersection improvement proposed in a NR listed or eligible historic district, requires the demolition of a modern building that is neither individually eligible for the NR nor is a contributing element of the district. Although no right-of-way will be acquired from an individually eligible or contributing property, it is consistent with the NHPA regulations that there will be an adverse effect to the historic district because of changes resulting from the wider intersection and installation of more extensive traffic signals. It may be reasonably determined, however, that no individually eligible property, contributing element, or the historic district as a whole will be substantially impaired. Accordingly, in this example a Section 4(f) use will not occur in the form of either a permanent incorporation or a constructive use.

When a project uses land from an individually eligible property within a historic district, or a property that is a contributing element to the historic district, Section 4(f) is applicable. In instances where a determination is made under Section 106 of no historic properties affected or no adverse effect, then the use may be approved with a *de minimis* impact determination. If the use does not qualify for a *de minimis* impact determination, an individual Section 4(f) evaluation will be necessary. Exceptions

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<sup>15</sup> <http://www.environment.fhwa.dot.gov/projdev/pd5sec4f.asp>

recognized in 23 CFR 774.13 may be applied to individually eligible or contributing properties within a historic district, and to contributing elements within a historic district.

**Question 7D: How are historic resources within highway rights-of-way considered?**

**Answer:** In some parts of the country it is not uncommon for historic objects or features not associated with the roadway to exist within the highway right-of-way. Examples include rock walls, fences, and structures that are associated with an adjacent historic property. Others are linear properties such as drainage systems or railroad corridors. These properties, objects, or features are either not transportation in nature or are part of the roadway itself. This condition occurs for various reasons such as historic property boundaries coinciding with the roadway centerline or edge of the road, or situations where right-of-way was acquired but historic features were allowed to remain in place. When a future transportation project is advanced resulting in a Section 106 determination of no historic properties affected or no adverse effect to such resources, there would be no Section 4(f) use. If the historic features are determined to be adversely affected, the adverse effect should be evaluated to determine whether it results in a Section 4(f) use.

**8. Historic Bridges, Highways and Other Transportation Facilities**

**Question 8A: How does Section 4(f) apply to historic transportation facilities?**

**Answer:** The Section 4(f) statute imposes conditions on the use of land from historic sites for highway projects but makes no mention of bridges, highways, or other types of facilities such as railroad stations or terminal buildings, which may be historic and are already serving as transportation facilities. The FHWA's interpretation is that the Congress clearly did not intend to restrict the rehabilitation or repair, of historic transportation facilities. The FHWA therefore established a regulatory provision that Section 4(f) approval is required only when a historic bridge, highway, railroad, or other transportation facility is adversely affected by the proposed project; e.g. the historic integrity (for which the facility was determined eligible for the NR) is adversely affected by the proposed project (*See* 23 CFR 774.13(a)).

**Question 8B: Will Section 4(f) apply to the replacement of a historic bridge that is left in place?**

**Answer:** FHWA's longstanding policy is that Section 4(f) does not apply to the replacement of a historic bridge on new location when the historic bridge is left in its original location and its historic integrity and value will be maintained. To maintain the integrity of the historic bridge, FHWA should ensure that a mechanism is in place for continued maintenance of the bridge that would avoid harm to the bridge due to neglect. In these situations it is also necessary to consider whether or not the proximity impacts of the new bridge will result in substantial impairment of the historic bridge that is left in place or whether there are other properties present which

should be afforded consideration pursuant to Section 4(f). These considerations should be documented in the project file.

**Question 8C: How do the requirements of Section 4(f) apply to donations of historic bridges to a State, locality, or responsible private entity?**

**Answer:** A State DOT or local public agency that proposes to demolish a historic bridge for a replacement project may first make the bridge available for donation to a State, locality or a responsible private entity. This process is commonly known as marketing the historic bridge and often involves relocation of the structure, if the bridge is of a type suitable for relocation. Provided the State, locality or responsible entity that accepts the bridge enters into an agreement to maintain the bridge and the features that contribute to its historic significance and assume all future legal and financial responsibility for the bridge, Section 4(f) will not apply to the bridge.

If the bridge marketing effort is unsuccessful and the bridge will be demolished or relocated without preservation commitments, Section 4(f) will apply and the appropriate Section 4(f) analysis, consultation and documentation will be required. The *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges*<sup>16</sup> may be used.

**Question 8D: Can the *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges* be applied to the replacement of a historic bridge or culvert that lacks individual distinction but is identified as a contributing element of a historic district that is on or eligible for listing on the NR?**

**Answer:** Historic districts may include properties or elements that lack individual distinction but possess sufficient integrity to contribute to the overall significance of the district, as well as individually distinctive features that may be separately listed or determined eligible for the NR. All contributing properties or elements, including identified features and their settings are considered eligible for the NR and are therefore Section 4(f) resources. As such, bridges in historic districts may be individually eligible but may also be identified as contributing features within the larger historic district. The *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges*<sup>17</sup> may be applied to any historic bridge or culvert, either contributing to a district or individually eligible. The application of the historic bridge programmatic Section 4(f) evaluation would be limited to the bridge replacement or rehabilitation only and must meet all the applicability criteria stated in the programmatic Section 4(f) evaluation. If the bridge replacement requires use, either direct or constructive, of surrounding or adjoining property that contributes to the significance of the historic district, the use of that property would have to be evaluated via another form of Section 4(f) evaluation,

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<sup>16</sup> The Section 4(f) programmatic evaluations are available at <http://www.environment.fhwa.dot.gov/4f/index.asp>

<sup>17</sup> The Section 4(f) programmatic evaluations are available at <http://www.environment.fhwa.dot.gov/>

including possibly an individual evaluation.

**Question 8E: Does Section 4(f) apply to the construction of an access ramp providing direct vehicular ingress/egress to a public boat launch area from an adjacent highway?**

**Answer:** When an access ramp is constructed as part of a project to construct a new bridge or to reconstruct, replace, repair, or alter an existing bridge on a Federal-aid system, FHWA's longstanding policy is that Section 4(f) approval is not necessary for the access ramp and public boat launching area. This policy was jointly developed by FHWA and the U.S. DOI in response to the enactment of section 147 of the *Federal-Aid Highways Act of 1976* (Pub. L. 94-280 (HR 8235) May 5, 1976). Where public boat launching areas are located in publicly owned parks, recreational areas, or refuges otherwise protected by the provision of Section 4(f), it would be contrary to the intent of section 147 to search for feasible and prudent alternatives to the use of such areas as a site for an access ramp to the public boat launching area. Such ramps must provide direct access to a public boat launching area adjacent to the highway. This policy only applies to the access ramp and public boat launching area; any other use of Section 4(f) property for the project will require Section 4(f) approval.

**Question 8F: Is compliance with Section 4(f) necessary for park roads and parkways projects funded under FHWA's Federal Lands Highway Program, 23 U.S.C. § 204?**

**Answer:** No. Park roads and parkways projects funded under FHWA's Federal Lands Highway Program, 23 U.S.C. § 204, are expressly excepted from Section 4(f) requirements within the Section 4(f) statute itself and by 23 CFR 774.13(e). A park road is "a public road, including a bridge built primarily for pedestrian use, but with capacity for use by emergency vehicles, that is located within, or provides access to, an area in the National Park System with title and maintenance responsibilities vested in the United States" and a parkway is a road "authorized by Act of Congress on lands to which title is vested in the United States" (23 U.S.C. § 101(a)).

**OFFICIALS WITH JURISDICTION; CONSULTATION; AND  
DECISIONMAKING**

**9. Officials with Jurisdiction**

**Question 9A: Who are the officials with jurisdiction for a park, recreation area, or wildlife and waterfowl refuge and what is their role in determining Section 4(f) applicability?**

**Answer:** The officials with jurisdiction are defined in 23 CFR 774.17. Under that definition, there may be more than one official with jurisdiction for the same Section 4(f) property. For public parks, recreation areas, and wildlife and waterfowl refuges (Question 1) the official(s) with jurisdiction are the official(s) of an agency or agencies that own and/or administer the property in question and who are empowered

to represent the agency on matters related to the property.

There may be instances where the agency owning or administering the land has delegated or relinquished its authority to another agency, via an agreement on how some of its land will function or be managed. The FHWA will review the agreement and determine which agency has authority on how the land functions. If the authority has been delegated or relinquished to another agency, that agency should be contacted to determine the purposes and significance of the property. Management plans that address or officially designate the purposes of the property should be reviewed as part of this determination. After consultation, and in the absence of an official designation of purpose and function by the officials with jurisdiction, FHWA will base its decision of Section 4(f) applicability on an examination of the actual functions that exist (*See* 23 CFR 774.11(c)).

The final decision on the applicability of Section 4(f) to a particular property is the responsibility of FHWA. In reaching this decision FHWA will rely on the official(s) with jurisdiction to identify the kinds of activities and functions that take place, to indicate which of these activities constitute the primary purpose, and to state whether the property is significant. Documentation of the determination of non- applicability should be included in the project file.

**Question 9B: Who are the officials with jurisdiction for historic sites?**

**Answer:** The officials with jurisdiction are defined in 23 CFR 774.17. For historic properties (Question 2 and 7) the official with jurisdiction is the State Historic Preservation Officer (SHPO). If the historic property is located on tribal land the Tribal Historic Preservation Officer (THPO) is considered the official with jurisdiction. If the property is located on tribal land but the tribe has not assumed the responsibilities of the SHPO, as provided for in the NHPA, then the representative designated by the tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the Advisory Council on Historic Preservation (ACHP) is involved in the consultation concerning a property under Section 106 of the NHPA,<sup>18</sup> the ACHP will also be considered an official with jurisdiction over that resource. For a NHL, the National Park Service is also an official with jurisdiction over that resource.

**Question 9C: Who are the officials with jurisdiction when a park, recreation area, or refuge is also a historic site or contains historic sites within its boundaries?**

**Answer:** Some public parks, recreation areas, and wildlife and waterfowl refuges are also historic properties either listed or eligible for listing on the NR. In other cases, historic sites are located within the property boundaries of public parks, recreation areas, or wildlife and waterfowl refuges. When either of these situations exists and a project alternative proposes the use of land from the historic site there will be more than one official with jurisdiction. For historic sites the SHPO/THPO

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<sup>18</sup> 36 CFR Part 800 (<http://www.achp.gov/work106.html>)

and ACHP if participating are officials with jurisdiction. Coordination will also be required with the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property, such as commenting on project impacts to the activities, features, or attributes of property and on proposed mitigation measures. For a NHL, the National Park Service is also an official with jurisdiction over that resource.

**Question 9D: When is coordination with the U.S. DOI required?**

**Answer:** Prior to FHWA's final approval of a Section 4(f) use, individual Section 4(f) evaluations are provided to the U.S. DOI Office of Environmental Compliance and Policy, which coordinates the comments of all U.S. DOI agencies involved in the project (*See* 23 CFR 774.5(a)). However, the official with jurisdiction for Section 4(f) purposes is typically the field official charged with managing the Section 4(f) property at issue. For example, the official with jurisdiction for a project involving the use of a National Wildlife Refuge would be the Refuge Manager. If it is not clear which individual within the U.S. DOI is the official with jurisdiction for a particular Section 4(f) property, U.S. DOI's Office of Environmental Compliance and Policy should be consulted to resolve the question. The U.S. DOI has very specific expectations regarding the submission of Section 4(f) documents.<sup>19</sup> If the Section 4(f) property is under the jurisdiction of the U.S. Forest Service, the Department of Agriculture would be contacted for its review. The final authority on the content and format of Section 4(f) documents is FHWA's, as specified in 23 CFR Part 774, this *Section 4(f) Policy Paper* and the *Technical Advisory*, T 6640.8A, *Guidance for Preparing and Processing of Environmental and Section 4(f) Documents*.

It is not necessary to coordinate project specific applications of existing programmatic Section 4(f) evaluations with the U.S. DOI unless the U.S. DOI owns or has administrative oversight over the Section 4(f) property involved. In these cases, FHWA will need written concurrence from the U.S. DOI as the official with jurisdiction as stipulated in the applicable programmatic Section 4(f) evaluation. Consultation with the U.S. DOI was conducted during the development of all the existing programmatic Section 4(f) evaluations. Development of any new programmatic Section 4(f) evaluations would also require coordination with the U.S. DOI before they are made available for use (*See* 23 CFR 774.3(d)(2)).

Similarly, it is not necessary to conduct project-level coordination with the U.S. DOI when processing *de minimis* impact determinations unless the U.S. DOI has administrative oversight over the public park, recreation area, or wildlife and waterfowl refuge involved. In these situations, FHWA must obtain concurrence from the U.S. DOI as the official having jurisdiction that there is no adverse effect to the activities, features, or attributes of the property (*See* 23 CFR 774.5(b)). When a *de minimis* impact determination is anticipated for a historic site owned or administered by the U.S. DOI, and when the historic site is a NHL, the U.S. DOI will have the opportunity to participate during the Section 106 consultation as a consulting party

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<sup>19</sup> [http://www.doi.gov/pmb/oepe/nrm/upload/Environmental\\_Review\\_Process.pdf](http://www.doi.gov/pmb/oepe/nrm/upload/Environmental_Review_Process.pdf)



(See Questions 11 through 13 for further guidance on de minimis impact determinations).

For situations in which the Section 4(f) property is encumbered with a Federal interest, for example as a result of a U.S. DOI grant, the answer to Question 1D or Question 31 may apply.

**Question 9E: What is the official status of the *Handbook on Departmental Reviews of Section 4(f) Evaluations*, originally issued in February 2002 (and any subsequent revisions) by the U.S. DOI Office of Environmental Policy and Compliance?**

**Answer:** The U.S. DOI Handbook<sup>20</sup> is intended to provide guidance to the National Park Service (NPS), the U.S. Fish and Wildlife Service and other designated lead bureaus in the preparation of U.S. DOI comments on the Section 4(f) evaluations prepared by the U.S. DOT pursuant to the authority granted in the Section 4(f) statute. The Handbook is an official U.S. DOI document and includes departmental opinion related to the applicability of Section 4(f) to lands for which they have jurisdiction and authority. The Section 4(f) statute requires U.S. DOT to consult and cooperate with the U.S. DOI as well as the Departments of Agriculture and Housing and Urban Development, as appropriate in Section 4(f) program and project related matters. The FHWA values the U.S. DOI's opinions related to the resources under their jurisdiction, and while the Handbook is a resource which FHWA may consider, it is not the final authority on Section 4(f) determinations.

Official FHWA policy on the applicability of Section 4(f) to lands that fall within the jurisdiction of the U.S. DOI is contained within 23 CFR 774 and this Section 4(f) Policy Paper. While FHWA is not legally bound by the guidance contained within the Handbook or the comments provided by the U.S. DOI or lead bureaus, every attempt should be made to reach agreement during project consultation. In some situations, one of the bureaus may be an official with jurisdiction. When unresolved conflicts arise during coordination with the U.S. DOI related to the applicability of Section 4(f) to certain types of property, it might be necessary for the Division Office to contact the FHWA Headquarters Office of Project Development and Environmental Review for assistance.

**Question 9F: Section 4(f) also requires cooperation and consultation with the U.S. Department of Agriculture (USDA) and the U.S. Department of Housing and Urban Development (HUD). When is coordination with the USDA or HUD on a Section 4(f) matter appropriate?**

**Answer:** Many national forests under the jurisdiction of the U.S. Forest Service of the USDA serve as multiple-use land holdings as described in Question 4. If the project uses land of a national forest, coordination with the USDA as the official with jurisdiction over the resource would be appropriate in determining the purposes served by the land holding and the resulting extent of Section 4(f) applicability to the

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<sup>20</sup> <http://www.doi.gov/oepe/handbook.html>

land holding. HUD would be involved only in cases where HUD had an interest in a Section 4(f) property.

**Question 9G: Who makes Section 4(f) decisions and *de minimis* impact determinations?**

**Answer:** The FHWA Division Administrator is the responsible official for all Section 4(f) applicability decisions, approvals, and *de minimis* impact determinations for Federal-aid projects. The FHWA Federal Lands Highway Division Engineer has this authority for Federal Lands projects. Coordination with the FHWA Headquarters or the FHWA Office of the Chief Counsel is not required for routine *de minimis* impact determinations but is recommended where assistance is needed for controversial projects or complex situations. It will be necessary for FHWA to consult and coordinate with the official(s) with jurisdiction as discussed above in making determinations of applicability and in approving the use of Section 4(f) property. When a programmatic Section 4(f) evaluation is relied upon to satisfy Section 4(f), the consultation requirements and approval process for the specific programmatic evaluation must be followed (*See* 23 CFR 774.3(d)).

**10. Section 4(f) Evaluations for Tiered Projects**

**Question 10: How is Section 4(f) handled in tiered NEPA documents?**

**Answer:** The FHWA must comply with 23 CFR 774.7(e) when tiered NEPA documents are used. In a tiered Environmental Impact Statement (EIS), the project development process moves from a broad scale examination at the first-tier stage to a more site specific evaluation in the second-tier stage. During the first-tier stage the detailed information necessary to complete the Section 4(f) approval may not be available. Even so, this does not relieve the FHWA from its responsibility to determine the possibility of making *de minimis* impact determinations or to consider alternatives that avoid the use of Section 4(f) properties during the first-tier stage. This analysis and documentation should address potential uses of Section 4(f) property and whether those uses could have a bearing on the decision to be made during this tier.

If sufficient information is available, a preliminary Section 4(f) approval may be made at the first-tier stage as to whether the impacts resulting from the use of a Section 4(f) property are *de minimis* or whether there are feasible and prudent avoidance alternatives. This preliminary approval must include all possible planning to minimize harm to the extent that the level of detail available at this stage allows (23 CFR 774.7(e)(1)). This planning may be limited to a commitment to ensure that opportunities to minimize harm at subsequent stages in the project development process have not been precluded by decisions made at the first-tier stage. Any preliminary Section 4(f) approvals must be incorporated into the first-tier EIS (23 CFR 774.7(e)(1)).

If sufficient information is unavailable during the first-tier stage, then the EIS may be completed without any preliminary Section 4(f) approvals. The documentation should state why no preliminary approval is possible during the first-tier stage and clearly explain the process that will be followed to complete Section 4(f) evaluations during subsequent tiers. The extent to which a Section 4(f) approval (preliminary or final) anticipated to be made in a subsequent tier may have an effect on any decision made during the first-tier stage should be discussed. Schedules to complete Section 4(f) evaluations, if available, should also be reported.

Preliminary first-tier Section 4(f) approvals will be finalized in the second-tier CE, EA, final EIS, ROD or FONSI, as appropriate (*See* 23 CFR 774.7(e)(2)). If no new Section 4(f) use, other than a *de minimis* impact, is identified in the second-tier study and if all possible planning to minimize harm has occurred, then the second-tier Section 4(f) approval may finalize the preliminary approval by reference to the first-tier documentation. Re-evaluation of the preliminary Section 4(f) approval is only needed to the extent that new or more detailed information available at the second-tier stage raises new Section 4(f) concerns not already considered.

## **DE MINIMIS IMPACT DETERMINATIONS**

### **11. *De minimis* Impact Determinations for Parks, Recreation Areas, and Wildlife and Waterfowl Refuges**

**Question 11A: What constitutes a *de minimis* impact with respect to a park, recreation area, or wildlife and waterfowl refuge?**

**Answer:** An impact to a public park, recreation area, or wildlife and waterfowl refuge may be determined to be *de minimis* if the transportation use of the Section 4(f) property, including incorporation of any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures), does not adversely affect the activities, features, or attributes that qualify the resource for protection under Section 4(f). Language included in the SAFETEA-LU Conference Report provides additional insight on the meaning of *de minimis* impact:

The purpose of the language is to clarify that the portions of the resource important to protect, such as playground equipment at a public park, should be distinguished from areas such as parking facilities. While a minor but adverse effect on the use of playground equipment should not be considered a *de minimis* impact under Section 4(f), encroachment on the parking lot may be deemed *de minimis*, as long as the public's ability to access and use the site is not reduced.

(Conference Report of the Committee of Conference on H.R. 3, Report 109-203, page 1057).

This simple example helps to distinguish the activities, features, or attributes of a

Section 4(f) property that are important to protect from those which can be used without resulting in adverse effects. Playground equipment in a public park may be central to the recreational value of the park that Section 4(f) is designed to protect. The conference report makes it clear that when impacts are proposed to playground equipment or other essential features, a *de minimis* impact finding will at a minimum require a commitment to replace the equipment with similar or better equipment at a time and in a location that results in no adverse effect to the recreational activity. A parking lot encroachment or other similar type of land use, on the other hand, could result in a *de minimis* impact with minimal mitigation, as long as there are no adverse effects on public access and the official(s) with jurisdiction agree.

The impacts of a transportation project on a park, recreation area, or wildlife and waterfowl refuge that qualifies for Section 4(f) protection may be determined to be *de minimis* if:

- 1) The transportation use of the Section 4(f) property, together with any impact avoidance, minimization, and mitigation or enhancement measures incorporated into the project, does not adversely affect the activities, features, or attributes that qualify the resource for protection under Section 4(f);
- 2) The public has been afforded an opportunity to review and comment on the effects of the project on the protected activities, features, or attributes of the Section 4(f) property; and
- 3) The official(s) with jurisdiction over the property, after being informed of the public comments and FHWA's intent to make the *de minimis* impact finding, concur in writing that the project will not adversely affect the activities, features, or attributes that qualify the property for protection under Section 4(f).

(See 23 CFR 774.5(b)(2), 23 CFR 774.17). The concurrence of the official(s) with jurisdiction that the protected activities, features, or attributes of the resource are not adversely affected must be in writing (23 CFR 774.5(b)(2)(ii)). The written concurrence can be in the form of a signed letter on agency letterhead, signatures in concurrence blocks on transportation agency documents, agreements provided via e-mail or other method deemed acceptable by the FHWA Division Administrator. Obtaining these agreements in writing and retaining them in the project file is consistent with effective practices related to preparing project administrative records.

**Question 11B: What role does mitigation play in the *de minimis* impact finding?**

**Answer:** *De minimis* impact determinations are based on the degree of impact after the inclusion of any measure(s) to minimize harm, (such as any avoidance, minimization, mitigation, or enhancement measures) to address the Section 4(f) use (i.e., net impact). The expected positive effects of any measures included in a project to mitigate the adverse effects to a Section 4(f) property must be taken into account when determining whether the impact is *de minimis* (See 23 CFR 774.3(b)). The purpose of taking such measures into account is to encourage the incorporation of Section 4(f) protective measures as part of the project. *De minimis* impact findings

must be expressly conditioned upon the implementation of any measures that were relied upon to reduce the impact to a *de minimis* level (See 23 CFR 774.7(b)). The implementation of such measures will become the responsibility of the project sponsor with FHWA oversight (See 23 CFR 771.109(b)).

**Question 11C: What constitutes compliance with the public notice, review and comment requirements for *de minimis* impact findings for parks, recreation areas or wildlife and waterfowl refuges?**

**Answer:** Information supporting a *de minimis* impact finding for a park, recreation area or refuge should be included in the NEPA document prepared for the project. This information includes, at a minimum, a description of the involved Section 4(f) property(ies), use and impact(s) to the resources and any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) that are included in the project as part of the *de minimis* impact finding. The public involvement requirements associated with specific NEPA document and process will, in most cases, be sufficient to satisfy the public notice and comment requirements for the *de minimis* impact finding (See 23 CFR 774.5(b)(2)).

In general, the public notice and comment process related to *de minimis* impact findings will be accomplished through the State DOT's approved public involvement process (See 23 CFR 771.111(h)(1)). For those actions that do not routinely require public review and comment (e.g., certain categorical exclusions and re-evaluations) but for which a *de minimis* impact finding will be made, a separate public notice and opportunity for review and comment will be necessary. In these cases, appropriate public involvement should be based on the specifics of the situation and commensurate with the type and location of the Section 4(f) property, the impacts, and public interest. Possible methods of public involvement are many and include newspaper advertisements, public meetings, public hearings, notices posted on bulletin boards (for properties open to the public), project websites, newsletters, and placement of notices or documents at public libraries. All comments received and responses thereto, should be documented in the same manner that other comments on the proposed action would be incorporated in the project file. Where public involvement was initiated solely for the purpose of a *de minimis* impact finding, responses or replies to the public comments may not be required, depending on the substantive nature of the comments. All comments and responses should be documented, as appropriate, in the project file.

## **12. *De minimis* Impact Determinations on Historic Sites**

**Question 12A: What are the requirements for *de minimis* impact on a historic site?**

**Answer:** A finding of *de minimis* impact on a historic site may be made when:

- 1) FHWA has considered the views of any consulting parties participating in the consultation required by Section 106 of the NHPA, including the Secretary of

- the Interior or his representative if the property is a NHL;
- 2) The SHPO/THPO, and Advisory Council on Historic Preservation (ACHP) if participating in the Section 106 consultation, are informed of FHWA's intent to make a *de minimis* impact finding based on their written concurrence in the Section 106 determination of "no adverse effect;" and
  - 3) The Section 106 process results in a determination of "no adverse effect" with the written concurrence of the SHPO/THPO, and ACHP if participating in the Section 106 consultation.<sup>21</sup>

(See 23 CFR 774.5(b)(1) and the definition of *de minimis* impact in 23 CFR 774.17.)

**Question 12B: How should the concurrence of the SHPO/THPO, and ACHP if participating in the Section 106 determination of effect, be documented when the concurrence will be the basis for a *de minimis* impact finding?**

**Answer:** Section 4(f) requires that the SHPO/THPO, and ACHP if participating, must concur in writing in the Section 106 determination of no adverse effect (See 23 CFR 774.5(b)(1)(ii)). The request for concurrence in the Section 106 determination should include a statement informing the SHPO/THPO, and ACHP if participating, that FHWA or FTA intends to make a *de minimis* impact finding based upon their concurrence in the Section 106 determination.

Under the Section 106 regulation, if a SHPO/THPO does not respond within a specified time frame FHWA may move forward to the next step of the Section 106 process but Section 4(f) explicitly requires their written concurrence (See 23 CFR 774.5(b)(1)(ii)). It is therefore recommended that transportation officials share this guidance with the SHPOs and THPOs in their States so that these officials fully understand the implication of their concurrence in the Section 106 determinations and the reason for requesting written concurrence.

**Question 12C: For historic sites, will a separate public review process be necessary for the determination of a *de minimis* impact?**

**Answer:** No. The FHWA will consult with the parties participating in the Section 106 process but is not required to provide additional public notice or provide additional opportunity for review and comment. Documentation of consulting party involvement is required (See 23 CFR 774.5(b) and 774.7(b)). In addition, for projects requiring the preparation and distribution of a NEPA document, the information supporting a *de minimis* impact finding will be included in the NEPA documentation and the public will be afforded an opportunity to review and comment during the formal NEPA process.

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<sup>21</sup> Although the Section 4(f) statute and regulations also provide for *ade minimis* impact determination in the situation where there is a use of a historic site resulting in a Section 106 determination of *no historic properties affected*, FHWA has not yet encountered any such situation in practice. If such situation arises, a *de minimis* impact determination would be appropriate.

**Question 12D:** Certain Section 106 programmatic agreements (PAs) allow the lead agency to assume the concurrence of the SHPO/THPO in the determination of *no adverse effect* or *no historic properties affected* if a response to a request for concurrence is not received within the time period specified in the PA. Does such concurrence through non-response, in accordance with a written and signed Section 106 PA, constitute the written concurrence needed to make a *de minimis* impact finding?

**Answer:** In accordance with the provisions of a formal Section 106 programmatic agreement (PA), if the SHPO/THPO does not respond to a request for concurrence in the Section 106 determination within a specified time frame, the non-response together with the written PA, will be considered written concurrence in the Section 106 determination that will be the basis for the *de minimis* impact finding by FHWA. The FHWA must inform the SHPO/THPO who are parties to such PAs, in writing, that a non-response which is treated as a concurrence in a no adverse effect or no historic properties affected determination will also be treated as the written concurrence for purposes of the FHWA *de minimis* impact finding (*See* 23 CFR 774.5(b)(1)(ii)). It is recommended that this understanding of the parties be documented via formal correspondence or other written means and appended to the existing PA. There is no need to amend the PA itself.

### **13. Other *De minimis* Impact Considerations**

**Question 13A:** Are *de minimis* impact findings limited to any particular type of project or National Environmental Policy Act (NEPA) document?

**Answer:** No, the *de minimis* impact criteria may be applied to any project, as appropriate, regardless of the type of environmental document required by the NEPA process as described in the FHWA Environmental Impact and Related Procedures (*See* 23 CFR 771.115).

**Question 13B:** What effect does the *de minimis* impact provision have on the application of the existing FHWA nationwide programmatic Section 4(f) evaluations?

**Answer:** None. Existing FHWA programmatic Section 4(f) evaluations<sup>22</sup> remain in effect and may be applied, as appropriate, to the use of Section 4(f) property by a highway project.

**Question 13C:** Can a *de minimis* impact finding be made for a project as a whole, when multiple Section 4(f) properties are involved?

**Answer:** No, when multiple Section 4(f) properties are present in the study area and potentially used by a transportation project, *de minimis* impact findings must be made for the individual Section 4(f) properties because 23 CFR 774.3 requires an approval

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<sup>22</sup> <http://environment.fhwa.dot.gov/projdev/4fnspeval.asp>

to use Section 4(f) property. The impacts to Section 4(f) properties and any impact avoidance, minimization, and mitigation or enhancement measures must be considered on an individual resource basis and *de minimis* impact findings made individually for each Section 4(f) property. When there are multiple resources for which *de minimis* impact findings are appropriate, however, the procedural requirements of Section 4(f) can and should be completed in a single process, document and circulation, so long as it is clear that distinct determinations are being made. Also in these cases, the written concurrence of the official(s) with jurisdiction may be provided for the project as a whole, so as long as the *de minimis* impacts findings have been made on an individual resource basis. For example, a no adverse effect determination made on an undertaking as a whole may be used to support individual *de minimis* impact findings provided individual historic sites are clearly identified in the Section 106 documentation.

## **ADDITIONAL EXAMPLES AND OTHER CONSIDERATIONS**

### **14. School Playgrounds**

**Question 14: Are publicly owned school playgrounds subject to the requirements of Section 4(f)?**

**Answer:** While the primary purpose of public school playgrounds is generally for structured physical education classes and recreation for students, these properties may also serve significant public recreational purposes and therefore may be subject to Section 4(f) requirements. When a public school playground serves only school activities and functions, the playground is not subject to Section 4(f). When a public school playground is open to the public and serves either organized or substantial walk-on recreational purposes that are determined to be significant (*See* Question 1), it will be subject to the requirements of Section 4(f). The actual function of the playground is the determining factor in these circumstances. Documentation should be obtained from the officials with jurisdiction over the facility stating whether or not the playground is of local significance for recreational purposes.

There may be more than one official with jurisdiction over a school playground. A school official is considered to be the official with jurisdiction of the land during school activities. However, in some cases a school board may have authorized another public agency (e.g., the city park and recreation department) to control the facilities after school hours. In such cases, the public agency with authority to control the playground would be considered an official with jurisdiction with regard to any after-hours use of the playground. The FHWA is responsible for determining which official or officials have jurisdiction over a playground.

The term playground refers to the area of the school property developed and/or used for public park or recreation purposes such as baseball diamonds, soccer fields, tennis courts, track and field facilities, and other features such as jungle gyms or swing sets. This can also include open space or practice fields if those areas serve a park or



recreation function. Section 4(f) would apply to the playground areas only and not the entire campus, unless the school and campus are also significant historic sites.

## **15. Trails and Shared Use Paths**

### **Question 15A: Do the requirements of Section 4(f) apply to shared use paths or similar facilities?**

**Answer:** FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. If the publicly owned facility is primarily used for transportation and is an integral part of the local transportation system, the requirements of Section 4(f) would not apply since it is not a recreational area. Section 4(f) would apply to a publicly owned, shared use path or similar facility (or portion thereof) designated or functioning primarily for recreation, unless the official(s) with jurisdiction determines that it is not significant for such purpose. During early consultation, it should be determined whether or not a management plan exists that addresses the primary purpose of the facility in question. If the exceptions in 23 CFR 774.13(f) and (g) do not apply, the utilization of the *Programmatic Section 4(f) Evaluation for Independent Bikeway or Walkway Construction Projects* should be considered if the facility is within a park or recreation area. Whether Section 4(f) applies or not, it is FHWA's policy that every reasonable effort should be made to maintain the continuity of existing and designated shared use paths and similar facilities.<sup>23</sup>

### **Question 15B: The National Trails System Act permits the designation of scenic, historic, and recreation trails. Are these trails or other designated scenic or recreation trails on publicly owned land subject to the requirements of Section 4(f)?**

**Answer:** FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. National Scenic Trails (other than the Continental Divide National Scenic Trail) and National Recreation Trails that are on publicly owned recreation land are subject to Section 4(f), provided the trail physically exists on the ground thereby enabling active recreational use.

The Continental Divide National Scenic Trail and National Historic Trails are treated differently. Public Law 95-625 provides that "except for designated protected components of the trail, no land or site located along a designated National Historic Trail or along the Continental Divide National Scenic Trail shall be subject to the provisions of [Section 4(f)] unless such land or site is deemed to be of historical significance under the appropriate historical criteria such as those for the [NR]." FHWA interprets this to mean that while the Continental Divide National Scenic Trail

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<sup>23</sup> Title 23, Section 109(m) states: "The Secretary shall not approve any project or take any regulatory action under this title that will result in the severance of an existing major route or have significant adverse impact on the safety for non- motorized transportation traffic and light motorcycles, unless such project or regulatory action provides for a reasonable alternate route or such a route exists."

and the National Historic Trails themselves are exempt from Section 4(f), trail segments (including similar components such as trail buffers or other adjacent sites that were acquired to complement the trails) that are on or eligible for the NR are subject to Section 4(f) (*See* 23 CFR 774.13(f)(2)).

**Question 15C: Are shared use paths, bikeways, or designated scenic or recreational trails on highway rights-of-way subject to the requirements of Section 4(f)?**

**Answer:** FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. If a path or trail is simply described as occupying the right-of-way of the highway and is not limited to any specific location within the right-of-way, a use of land would not occur provided that adjustments or changes in the alignment of the highway or the trail would not substantially impair the continuity of the path or trail. In this regard, it would be helpful if all future designations, including those made under the National Trails System Act, describe the location of the trail only as generally in the right-of-way.

**Question 15D: Are trails on privately owned land, including land under public easement and designated as scenic or recreational trails subject to the requirements of Section 4(f)?**

**Answer:** FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. Section 4(f) generally does not apply to trails on privately owned land. Section 4(f) could apply if an existing public easement permits public access for recreational purposes. In any case, it is FHWA's policy that every reasonable effort should be made to maintain the continuity of existing and designated trails.

**Question 15E: Does Section 4(f) apply to trail-related projects funded under the Recreational Trails Program (RTP)?**

**Answer:** No, projects funded under the Recreational Trails Program (RTP)<sup>24</sup> are exempt from the requirements of Section 4(f) by statute.<sup>25</sup> The exemption is limited to Section 4(f) and does not apply to other environmental requirements, such as NEPA or the NHPA.

## **16. User or Entrance Fees**

**Question 16: Does the charging of an entry or user fee affect Section 4(f) eligibility?**

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<sup>24</sup> More information on the Recreational Trails Program is available at [www.fhwa.dot.gov/environment/rectrails/](http://www.fhwa.dot.gov/environment/rectrails/).

<sup>25</sup> 23 U.S.C. § 206(h)(2) Recreational purpose.--A project funded under this section is intended to enhance recreational opportunity and is not subject to section 138 of this title or section 303 of title 49.

**Answer:** Many eligible Section 4(f) properties require a fee to enter or use the facility such as State Parks, National Parks, publicly owned ski areas, historic sites and public golf courses. The assessment of a user fee is generally related to the operation and maintenance of the facility and does not in and of itself negate the property's status as a Section 4(f) property. Therefore, it does not matter in the determination of Section 4(f) applicability whether or not a fee is charged, as long as the other criteria are satisfied.

Consider a public golf course as an example. Greens-fees are usually if not always required (Question 18A) and these resources are considered Section 4(f) properties when they are open to the public and determined to be significant. The same rationale should be applied to other Section 4(f) properties in which an entrance or user fee is required.

## **17. Transportation Enhancement Projects**

### **Question 17A: How is Section 4(f) applied to transportation enhancement activity projects?<sup>26</sup>**

**Answer:** FHWA must comply with 23 CFR 774.13(g) when determining if a Section 4(f) approval is necessary for a use by a transportation enhancement project or a mitigation activity. A transportation enhancement activity (TEA) is one of the specific types of activities set forth by statute at 23 U.S.C. § 101(a)(35). TEAs often involve the enhancement of an activity, feature or attribute on property that qualifies as a Section 4(f) property. In most cases, such work would be covered by the exception in 23 CFR 774.13(g) when the work is solely for the purpose of preserving or enhancing an activity, feature or attribute that qualified the property for Section 4(f) protection. The official(s) with jurisdiction over the Section 4(f) property must concur in writing with this assessment. For a use of Section 4(f) property to occur in conjunction with a TEA, there must be a transportation use of land from an existing Section 4(f) property. In other words, the State DOT or other applicant as defined in 23 CFR 774.17 must acquire land from a Section 4(f) property and convert its function from park, recreation, refuge or historic purposes to a transportation purpose.

Many TEA-funded activities will occur on land that remains owned by a non-transportation entity (such as a local or State parks and recreation agency). An example would be a TEA proposed to construct a new bicycle/pedestrian path within a public park or to reconstruct an already existing bicycle/pedestrian path within a public park. Though related to surface transportation, this type of project is primarily intended to enhance the park. Either scenario would qualify as an exception for Section 4(f) approval assuming the official(s) with jurisdiction agree in writing that the TEA provides for enhancement of the bicycle/pedestrian activities within the park.

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<sup>26</sup>. For more information see the *FHWA Final Guidance on Transportation Enhancement Activities*; December 17, 1999, and the TE Program Related Questions & Answers; August 2002, found at the Transportation Enhancement Website ([www.fhwa.dot.gov/environment/te/index.htm](http://www.fhwa.dot.gov/environment/te/index.htm)).

A variation of the above example is local public agency that proposes a TEA for construction of a new bicycle/pedestrian facility that requires the acquisition of land from a public park. The purpose of the project is to promote a non- motorized mode of travel for commuters even though some recreational use of the facility is likely to occur. This TEA requires a transfer of land from the parks and recreation agency to the local transportation authority for ultimate operation and maintenance of the newly constructed bicycle/pedestrian facility. Since this TEA would involve the permanent incorporation of Section 4(f) land into a transportation facility, there is a use of Section 4(f) land and the appropriate Section 4(f) evaluation and documentation would be required. In this instance, the *Programmatic Section 4(f) Evaluation for Independent Bikeway or Walkway Construction Projects*<sup>27</sup> would likely apply depending on the particular circumstances of the project.

Other TEAs that involve acquisition of scenic or historic easements, or historic sites, often result in ultimate ownership and management of the facility by a non- transportation entity (such as a tourism bureau or historical society). An example would be the acquisition and/or restoration of a historic railroad station for establishment of a museum operated by a historical society. Even though Federal-aid transportation funds were used to acquire a historic building, a non- transportation entity ultimately will own and manage it. Accordingly, this TEA would qualify as an exception for Section 4(f) approval.

Section 106 still applies for any TEA involving a historic site on or eligible for listing on the NR. Please refer to the Nationwide Programmatic Agreement for Implementation of Transportation Enhancement Activities<sup>28</sup> that was issued in 1997 for more details.

For other complex or complicated situations involving TEA projects, it is recommended that the FHWA Division Office contact the Headquarters Office of Project Development and Environmental Review, the Resource Center Environment Technical Services Team, or the Office of the Chief Counsel for assistance.

**Question 17B: Is the exception in 23 CFR 774.13(g) limited solely to work that is funded as a TEA pursuant to 23 U.S.C. § 101(a)(35)?**

**Answer:** No. The exception cited in 23 CFR 774.13(g) refers to TEAs – though the term “project” is used instead of “activity” - and to mitigation activities (*See* Question 29 regarding mitigation activities). The discussion in the corresponding section of the preamble to the regulation involves TEAs within the context of 23 U.S.C. § 101(a)(35), but does not explicitly limit the exception to TEAs funded via the 10% set aside of Surface Transportation Program funds (*See 73 Fed. Reg.*13368, March 12, 2008). If proposed work very closely resembles a TEA but is not proposed for funding as a TEA, there are several options to consider.

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<sup>27</sup> <http://www.environment.fhwa.dot.gov/projdev/4fbikeways.asp>

<sup>28</sup> [http://www.fhwa.dot.gov/environment/te/gmemo\\_program.htm](http://www.fhwa.dot.gov/environment/te/gmemo_program.htm)

If the proposed work could be characterized as a project mitigation feature, then the exception in 23 CFR 774.13(g) would apply without further consideration contingent upon the official(s) with jurisdiction concurring in writing that the work is solely for the purpose of preserving or enhancing an activity, feature or attribute that qualified the property for Section 4(f) protection.

In addition, the introductory paragraph of this section of the regulation indicates that the “exceptions include, but are not limited to” those listed in the ensuing paragraphs. If proposed work resembles a TEA, avoidance of the property could be characterized as being inconsistent with the preservation purpose of the Section 4(f) statute. Uses of Section 4(f) property under the statute have long been considered to include only adverse uses that harm or diminish the resource that the statute seeks to protect. Further, this exception is limited to situations in which the official(s) with jurisdiction over the Section 4(f) property agrees that the use will either preserve or enhance an activity, feature, or attribute of the property that qualifies it for protection under Section 4(f). Work similar to TEAs may be very carefully evaluated on a case-by-case basis to determine if an exception for Section 4(f) approval might be justified consistent with the preservation purpose of the statute and 23 CFR 774.13(g).

If a Section 4(f) use is identified, under any scenario, the potential for complying with Section 4(f) via a *de minimis* impact finding or utilization of an approved programmatic Section 4(f) evaluation should be considered.

**Question 17C: Is it possible for a TEA to create a Section 4(f) property?**

**Answer:** Yes. TEA projects that are funded under TEA categories (A) *Provision of facilities for pedestrians and bicycles* and (H) *Preservation of abandoned railway corridors* (including the conversion and use of the corridors for pedestrian or bicycle trails) could create a new Section 4(f) resource. If a future Federal-aid highway project were to use the property, the fact that the resource was created with TEA funding would not preclude the application of Section 4(f).

**18. Golf Courses**

**Question 18A: Are public golf courses subject to Section 4(f), even when fees and reservations are required?**

**Answer:** Section 4(f) applies to golf courses that are owned, operated and managed by a public agency for the primary purpose of public recreation and determined to be significant. Section 4(f) does not apply to privately owned and operated golf courses even when they are open to the general public. Golf courses that are owned by a public agency but managed and operated by a private entity may still be subject to Section 4(f) requirements depending on the structure of the agreement.

The fact that greens-fees (Question 16) or reservations (tee times) are required by the

facility does not alter the Section 4(f) applicability, as long as the standards of public ownership, public access and significance are met.

Some golf courses are also historic sites. If a golf course is on or eligible for listing in the NR, then the Section 4(f) requirement for public ownership and public access will not apply.

**Question 18B: Are military golf courses subject to the requirements of Section 4(f)?**

**Answer:** Military golf courses are publicly owned (by the Federal Government) but are not typically open to the public at large. Because the recreational use of these facilities is limited to active duty and retired military personnel, family, and guests they are not considered to be public recreational areas and are not subject to the requirements of Section 4(f) (*See* Question 1D), unless they are significant historic sites (Question 2A).

**19. Museums, Aquariums, and Zoos**

**Question 19: Does Section 4(f) apply to museums, aquariums and zoos?**

**Answer:** Publicly owned museums, aquariums, and zoos are not normally considered parks, recreational areas, or wildlife and waterfowl refuges and are therefore not subject to Section 4(f), unless they are significant historic sites (Question 2A).

Publicly owned facilities such as museums, aquariums or zoos may provide additional park or recreational opportunities and will need to be evaluated on a case-by-case basis to determine if the primary purpose of the resource is to serve as a significant park or recreation area. To the extent that zoos are considered to be significant park or recreational areas, or are significant historic sites they will be treated as Section 4(f) properties.

**20. Fairgrounds**

**Question 20: Are publicly owned fairgrounds subject to the requirements of Section 4(f)?**

**Answer:** Section 4(f) is not applicable to publicly owned fairgrounds that function primarily for commercial purposes (e.g. stock car races, horse racing, county or state fairs), rather than as park or recreation areas. When fairgrounds are open to the public and function primarily for public recreation other than an annual fair, Section 4(f) applies only to those portions of land determined significant for park or recreational purposes (*See* Question 1A), unless they are significant historic sites (Question 2A).

**21. Bodies of Water**

**Question 21A: How does the Section 4(f) apply to publicly owned lakes and rivers?**

**Answer:** Lakes are sometimes subject to multiple, even conflicting, activities and do not readily fit into one category or another. Section 4(f) would only apply to those portions of publicly owned lakes and/or adjacent publicly owned lands that function primarily for park, recreation, or refuge purposes. Section 4(f) does not apply to areas which function primarily for other purposes or where recreational activities occur on incidental, secondary, occasional or dispersed basis.

In general, rivers are not subject to the requirements of Section 4(f). Those portions of publicly owned rivers, which are designated as recreational trails are subject to the requirements of Section 4(f). Of course, Section 4(f) would also apply to lakes and rivers, or portions thereof, which are contained within the boundaries of a park, recreation area, refuge, or historic site to which Section 4(f) otherwise applies.

**Question 21B: Are Wild and Scenic Rivers (WSR) subject to Section 4(f)?**

**Answer:** FHWA must comply with 23 CFR 774.11(g) when determining if there is a use of a WSR. The *National Wild and Scenic Rivers Act* (WSRA) (16 U.S.C. § 1271 et seq. and 36 CFR 297.3) identifies those rivers in the United States which are designated as part of the WSR System. A WSR is defined as a river and the adjacent area within the boundaries of a component of the National Wild and Scenic Rivers System (National System). WSRs may be designated by Congress or, if certain requirements are met, the Secretary of the Interior. Each river is administered by either a Federal or state agency. Four Federal agencies have primary responsibility for the National Wild and Scenic Rivers System, specifically the Forest Service, the National Park Service, the Fish and Wildlife Service and the Bureau of Land Management.

Within this system there are wild, scenic and recreational designations. A single river can be classified as having separate or combined wild, scenic and recreation areas along the entire river. The designation of a river under the WSRA does not in itself invoke Section 4(f) in the absence of significant Section 4(f) attributes and qualities. In determining whether Section 4(f) is applicable to these rivers, FHWA should consult with the official with jurisdiction (Question 21D) to determine how the river is designated, how the river is being used and examine the management plan over that portion of the river. If the river is publicly owned and designated a recreational river under the WSRA or is a recreation resource under a management plan, then it would be a Section 4(f) property. Conversely, if a river is included in the System and designated as wild but is not being used as or designated under a management plan as a park, recreation area, wildlife and waterfowl refuge and is not a historic site, then Section 4(f) would not apply.

Significant publicly owned public parks, recreation areas, or wildlife and waterfowl refuges and historic sites (on or eligible of the NR) in a WSR corridor are

subject to Section 4(f). Other lands in WSR corridors managed for multiple purposes may or may not be subject to Section 4(f) requirements, depending on the manner in which they are administered by the managing agency. Close examination of the management plan (as required by the WSRA) prior to any use of these lands for transportation purposes is necessary. Section 4(f) would apply to those portions of the land designated in a management plan for recreation or other Section 4(f) purposes as discussed above. Where the management plan does not identify specific functions, or where there is no plan, FHWA should consult further with the official with jurisdiction (Question 21D) prior to making the Section 4(f) determination. Privately owned lands in a WSR corridor are not subject to Section 4(f), except for significant historic and archeological sites when important for preservation in place (Question 3).

**Question 21C: Does Section 4(f) apply to potential WSR corridors and adjoining lands under study (pursuant to Section 5(a) of the WSRA)?**

**Answer:** No, Section 4(f) does not apply to potential WSRs and adjoining lands. In these cases, Section 4(f) would apply only to existing significant publicly owned public parks, recreation areas, refuges, or significant historic sites in the potential river corridor. It must be noted, however, that such rivers are protected under Section 12(a) of the WSRA,<sup>29</sup> which directs all Federal departments and agencies to protect river values and further recognizes that particular attention should be given to timber harvesting, road construction, and similar activities, which might be contrary to the purposes of this Act.

**Question 21D: Who are the Officials with Jurisdiction for WSRs?**

**Answer:** The definition of officials with jurisdiction is located in 23 CFR 774.17. For those portions of a WSR to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers<sup>30</sup> the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

## **22. Scenic Byways**

**Question 22: How does Section 4(f) apply to scenic byways?**

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<sup>29</sup> “The Secretary of the Interior, the Secretary of Agriculture, and the head of any other Federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System or under consideration for such inclusion, in accordance with section 2(a)(ii), 3(a), or 5(a), shall take such action respecting management policies, regulations, contracts, plans, affecting such lands, following the date of enactment of this sentence, as may be necessary to protect such rivers in accordance with the purposes of this Act.”

<sup>30</sup> Section 2(a)(ii) of the WSRA, 16 U.S.C. § 1273(a)(ii)



**Answer:** The designation of a road as a scenic byway is not intended to create a park or recreation area within the meaning of Section 4(f). The reconstruction, rehabilitation, or relocation of a publicly-owned scenic byway would not trigger Section 4(f) unless they are significant historic sites (Question 8).

## **23. Cemeteries**

### **Question 23A: Does Section 4(f) apply to cemeteries?**

**Answer:** Cemeteries would only be considered Section 4(f) properties if they are determined to be on or eligible for the NR as historic sites deriving significance from association with historic events, from age, from the presence of graves of persons of transcendent importance, or from distinctive design features.<sup>31</sup>

### **Question 23B: Does Section 4(f) apply to other lands that contain human remains?**

**Answer:** Informal graveyards, family burial plots, or Native American burial sites and those sites that contain Native American grave goods associated with burials, are not in and of themselves considered to be Section 4(f) property except when they are individually listed in or eligible for the NR. These sites should not automatically be considered only as archeological resources as many will have value beyond what can be learned by data recovery. If these sites are considered archeological resources on or eligible for the NR and also warrant preservation in place, Section 4(f) applies (*See* Question 3A).

When conducting the Section 4(f) determination for lands that may be Native American burial sites or sites with significance to a federally recognized tribe, consultation with appropriate representatives from the federally recognized tribes with interest in the site is essential. Sites containing human remains may also have cultural and religious significance to a tribe (*See* Question 6 for a discussion of Traditional Cultural Places).

## **24. Joint Development (Park with Highway Corridor)**

**Question 24: When a public park, recreation area, or wildlife and waterfowl refuge is established and an area within the Section 4(f) property is reserved for transportation use prior to or at the same time the Section 4(f) property was established, do the requirements of Section 4(f) apply?**

**Answer:** The FHWA must comply with 23 CFR 774.11(i) when determining if Section 4(f) applies to a property that was jointly planned for development with a future transportation corridor. Generally, the requirements of Section 4(f) do not apply to the subsequent use of the reserved area for its intended transportation

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<sup>31</sup> For more information on the subject of historic cemeteries see National Register Bulletin #41, *Guidelines for Evaluating and Registering Cemeteries and Burial Places*, 1992  
<http://www.cr.nps.gov/nr/publications/bulletins/nrb41/>

purpose. This is because the land used for the transportation project was reserved from and, therefore, has never been part of the protected Section 4(f) property. Nor is a constructive use of the Section 4(f) property possible, since it was jointly planned with the transportation project. The specific governmental action that must be taken to reserve a transportation corridor with the Section 4(f) property is a question of State and local law, but may include ordinances, adopted land use plans, deed restrictions, or other actions. Evidence that the reservation was contemporaneous with or prior to the establishment of the Section 4(f) property should be documented in the project file. Subsequent statements of intent to construct a transportation project within the resource should not be considered sufficient documentation. All measures which have been taken to jointly develop the transportation corridor and the park should be completely documented in the project files. To provide flexibility for the future transportation project, State and local transportation agencies are advised to reserve wide corridors. Reserving a wide corridor will allow the future transportation project to be designed to minimize impacts on the environmental resources in the corridor. The FHWA encourages the joint planning for the transportation project and the Section 4(f) property to specify that any land not needed for the transportation project right-of-way be transferred to the adjacent Section 4(f) property once the transportation project is completed.

## **25. Planned Section 4(f) Properties**

**Question 25: Do the requirements of Section 4(f) apply to publicly owned properties planned for park, recreation area, or wildlife refuge and waterfowl refuge purposes, even though they are not presently functioning as such?**

**Answer:** Section 4(f) applies when the land is one of the enumerated types of publicly owned lands and the public agency that owns the property has formally designated and determined it to be significant for park, recreation area, or wildlife and waterfowl refuge purposes. Evidence of formal designation would be the inclusion of the publicly owned land, and its function as a Section 4(f) property into a city or county Master Plan. A mere expression of interest or desire is not sufficient. For example, when privately held properties of these types are formally designated into a Master Plan for future park development, Section 4(f) is not applicable. The key is whether the planned facility is presently publicly owned, presently formally-designated for Section 4(f) purposes, and presently significant. When this is the case, Section 4(f) would apply.

## **26. Late Designation and Late Discovery of Section 4(f) Properties**

**Question 26A: Are properties in the transportation right-of-way designated (as park and recreation lands, wildlife and waterfowl refuges, or historic sites) late in the development of a proposed project subject to the requirements of Section 4(f)?**

**Answer:** FHWA must comply with 23 CFR 774.13(c) when determining if a Section 4(f) approval is necessary to use a late-designated property. Except for

archaeological resources, including those discovered during construction (Question 3B), a project may proceed without consideration under Section 4(f) if that land was purchased for transportation purposes prior to the designation or prior to a change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to the acquisition. The adequacy of effort made to identify properties protected by Section 4(f) should consider the requirements and standards that existed at the time of the search.

**Question 26B: How do you address a Section 4(f) use identified late in the process?**

**Answer:** When there will be a use of a Section 4(f) property that has changed or was not identified prior to processing a CE, FONSI, or ROD, a separate Section 4(f) approval will be required (23 CFR 774.9(c)) if a proposed modification of the alignment or design would require use of a Section 4(f) property; FHWA determines that Section 4(f) applies to the use of a property; or if a proposed modification of the alignment, design, or measures to minimize harm would result in a substantial increase in the amount of Section 4(f) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measures to minimize harm. Where a separate Section 4(f) approval is required, any activity not directly affected by the separate Section 4(f) approval can proceed during the analysis. A late discovery situation could also result when a property is overlooked despite a good faith effort to carry out adequate identification efforts and FHWA decides Section 4(f) now applies to a property. In cases where Section 4(f) may apply to archeological sites discovered during construction, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent avoidance alternatives will take account of the level of investment already made (*See* Question 3B).

**27. Temporary Recreational Occupancy or Use of Highway Rights-of-way**

**Question 27: Does Section 4(f) apply to temporary recreational uses of land owned by a State DOT or other applicant and designated for transportation purposes?**

**Answer:** FHWA must comply with 23 CFR 774.11(h) when determining the applicability of Section 4(f) to non-park properties that are temporarily functioning for recreation purposes. In situations where land owned by a SDOT or other applicant and designated for future transportation purposes (including highway rights-of-way) is temporarily occupied or being used for either authorized or unauthorized recreational purposes such as camping or hiking, Section 4(f) does not apply (*See* 23 CFR 774.11(h)). For authorized temporary occupancy of transportation rights-of-way for park or recreation purposes, it is advisable to make clear in a limited occupancy permit, with a reversionary clause that no long-term right is created and the park or recreational activity is a temporary one that will cease once completion of the highway or transportation project resumes.

**28. Tunneling or Bridging (Air Rights) and Section 4(f) Property**

**Question 28A: Is tunneling under a publicly owned public park, recreation area, wildlife or waterfowl refuge, or historic site subject to the requirements of Section 4(f)?**

**Answer:** Section 4(f) applies to tunneling only if the tunneling:

- 1) Disturbs archaeological sites that are on or eligible for the NR which warrant preservation in place;
- 2) Causes disruption which would permanently harm the purposes for which the park, recreation, wildlife or waterfowl refuge was established;
- 3) Substantially impairs the historic values of a historic site; or
- 4) Otherwise does not meet the exception for temporary occupancy (*See* Question 7A).

**Question 28B: Do the requirements of Section 4(f) apply to bridging over a publicly owned public park, recreation area, wildlife or waterfowl refuge, or historic site?**

**Answer:** Section 4(f) applies to bridging a Section 4(f) property if piers or other appurtenances are physically located in the Section 4(f) property, requiring an acquisition of land from the property (actual use). Where the bridge will span the Section 4(f) property entirely, the proximity impacts of the bridge on the Section 4(f) property should be evaluated to determine if the placement of the bridge will result in a constructive use (*See* 23 CFR 774.15 and Question 7A). An example of a potential constructive use would be substantial impairment to the utility of a trail resulting from severely restricted vertical clearance. If temporary occupancy of a Section 4(f) property is necessary during construction, the criteria discussed in Question 7A will apply to determine use.

**29. Mitigation Activities on Section 4(f) Property**

**Question 29: Does the expenditure of Title 23 funds for mitigation or other non-transportation activity on a Section 4(f) property result in a use of that property?**

**Answer:** FHWA must comply with 23 CFR 774.13(g) when determining if a Section 4(f) approval is necessary for a proposed mitigation activity. A Section 4(f) use occurs only when Section 4(f) land is permanently incorporated into a transportation facility, there is a temporary occupancy that is adverse, or there is a constructive use. If mitigation activities proposed within a Section 4(f) property are solely for the preservation or enhancement of the resource and the official(s) with jurisdiction agrees in writing with this assessment, a Section 4(f) use does not occur.

An example involves the enhancement, rehabilitation or creation of wetland within a park or other Section 4(f) property as mitigation for a transportation project's wetland impacts. Where this work is consistent with the function of the existing park and considered an enhancement of the Section 4(f) property by the

official with jurisdiction, then Section 4(f) would not apply. In this case the Section 4(f) land is not permanently incorporated into the transportation facility, even though it is a part of the project as mitigation.

### **30. Emergencies**

#### **Question 30: How does Section 4(f) apply in emergency situations?**

**Answer:** In emergency situations, the first concern is responding to immediate threats to human health or safety, or immediate threats to valuable natural resources. Compliance with environmental laws, such as Section 4(f), is considered later. The FHWA may participate in the costs of repair or reconstruction of Federal-aid highways and roads on Federal lands which have suffered serious damage as a result of (1) natural disasters or (2) catastrophic failures from an external cause. The Emergency Relief (ER) Program, (23 U.S.C. § 125), supplements the commitment of resources by States, their political subdivisions, or other Federal agencies to help pay for unusually heavy expenses resulting from extraordinary conditions. As FHWA retains discretionary control over whether to fund projects under this program, Section 4(f) applies to all ER funding decisions. The general sequence of events following the emergency is:

- 1) Restore essential service. State and local highway agencies are empowered to respond immediately, which includes beginning emergency repairs to restore essential traffic service and to prevent further damage to Federal-aid highway facilities. Section 4(f) compliance is not required at this stage.
- 2) Governor's proclamation
- 3) Preliminary notification
- 4) Acknowledgement
- 5) Damage assessments
- 6) Formal state request
- 7) Division Administrator's finding
- 8) Implementation of projects (this is where Section 4(f) compliance occurs)

Under the ER Program, repairs are categorized either as “emergency” or “permanent.” Emergency repairs are made during and immediately following a disaster to restore essential traffic, to minimize the extent of damage, or to protect the remaining facilities. Permanent repairs to restore the highway to its pre-disaster condition normally occur after the emergency repairs have been completed.

Section 4(f) compliance occurs during the “implementation of projects” stage for both emergency repairs and permanent repairs. For emergency repairs, Section 4(f) compliance is undertaken after the emergency repairs have been completed. For permanent repairs, Section 4(f) compliance is undertaken as

part of the normal NEPA project development process, just as it would be for any other type of Federal-aid or Federal lands project (i.e. it must be completed prior to the authorization of right-of-way and construction).

### **31. Section 6(f) and Other Non-U.S. DOT Grant-in-Aid Program Requirements**

**Question 31: How are Section 6(f) of the Land and Water Conservation Fund Act and other non-U.S. DOT Federal grant-in-aid program requirements administered for purposes similar to Section 4(f)'s preservationist purpose treated in the Section 4(f) process?**

**Answer:** For projects that propose the use of land from a Section 4(f) property purchased or improved with Federal grant-in-aid funds under the *Land and Water Conservation Fund Act*, the *Federal Aid in Fish Restoration Act* (Dingell-Johnson Act), the *Federal Aid in Wildlife Act* (Pittman-Robertson Act), or other similar law, or the lands are otherwise encumbered with a Federal interest, coordination with the appropriate Federal agency is required to ascertain the agency's position on the land conversion or transfer. Other Federal requirements that may apply to the property should be determined through consultation with the officials with jurisdiction and/or appropriate U.S. DOI, Housing and Urban Development, Federal Emergency Management Agency, or other Federal officials (*See* 23 CFR 774.5(d)). These Federal agencies may have regulatory authority or other requirements for converting land to a different use. These requirements are independent of the Section 4(f) requirements and must be satisfied during the project development process.

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